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In The Supreme Court of the United States

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Petitioners,

vs.

Jimmy Martin and Lucky Strike, LLC,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) apply to a facial constitutional challenge that South Carolina's anti-gambling statutes violate the Due Process and Equal Protection Clauses when South Carolina has created complex state administrative and judicial mechanisms that provide timely and adequate state court review of gambling forfeiture decisions and when this Court has previously ruled that the virtually identical South Carolina statutes are not violative of these Clauses of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit, were Defendants in the District Court and Appellees in the Court of Appeals.

Jimmy Martin and Lucky Strike, LLC, were Plaintiffs in the District Court and Appellants in the Court of Appeals and are Respondents here.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of South Carolina on behalf of himself, the Chief of the South Carolina Law Enforcement Division and the prosecutor for the Ninth Judicial Circuit of South Carolina, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case..

OPINIONS BELOW

The district court's opinion granting Petitioners' Motion to Dismiss (*Pet. App.* a51-a63) is reported at 438 F.Supp.2d 603 (D.S.C. 2006). The court of appeals opinion is reported at 499 F.3d 360, 25 A.L.R. Fed.2d 687 (4th Cir. 2007). (*Pet. App.* a1-a47). The order denying the Petition for Rehearing and Rehearing En Banc is found at *Pet. App.* a64-a65.

JURISDICTION

The court of appeals entered its judgment on August 29, 2007. A petition for rehearing and rehearing en banc was denied on September 20, 2007. *Pet. App.* a64-a65. The Court extended the time for filing the Petition for Certiorari until February 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

South Carolina's gambling statutes being challenged as unconstitutional are codified at S.C.

Code Ann. Sections 12-21-2710 and 12-21-2712. (2006). *Pet. App.* a66-a67.

STATEMENT

STATEMENT OF THE CASE

Procedural Background

South Carolina's anti-gambling statutes [S.C. Code Ann. Sections 12-21-2710 and 12-21-2712 (2006)], see *Pet. App.* a-66-a67, provide that slot machines, video poker machines, specific video games and any "other device pertaining to games of chance" are illegal and may not be possessed. Such possession is a crime. Pursuant to Section 12-21-2712, law enforcement officers must seize these devices and take them before a magistrate, who determines their legality under § 12-21-2710, on a machine-by-machine basis. *Allendale Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004). Devices violative of Section 12-21-2710 are ordered destroyed, subject to the right of the owner to a post-seizure hearing and appeal. *Mims Amusement Co. v. SLED*, 366 S.C. 141, 621 S.E.2d 344 (2005).

Respondents sought declaratory and injunctive relief in federal court, contending that Sections 12-21-2710 and 12-21-2712 violate the Due Process and Equal Protection Clauses. Specifically, Respondents' Complaint contends that Section 12-21-2710 is void for vagueness, and thus violates the Due Process Clause. Moreover, it is alleged that the failure of the two statutes to provide a pre-enforcement mechanism for

determining the legality of a particular type of machine or device contravenes the Equal Protection Clause. Finally, Respondent contends the State has discriminatorily enforced these statutes. *Pet. App.* a68-a81.

The District Court dismissed the action, abstaining under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Pet. App.* a51-a63. Respondents appealed, and the Fourth Circuit panel reversed, over a vigorous dissent by Judge Wilkinson. The majority deemed *Burford* inapplicable essentially because Respondents are challenging the "facial" constitutionality of Sections 12-21-2710 and 12-21-2712. In the view of the majority, Respondents' claims "present no difficult questions of state law whose importance outweighs the federal interest in adjudicating Martin's constitutional case," nor do the claims "threaten a state interest in uniform regulation that outweighs the federal interest in adjudicating the case." *Id.* at a12. The panel concluded that if successful, Respondents would be entitled to have enjoined "all enforcement of the statutes at issue; such relief could not possibly threaten their *uniform* application." *Id.* at a15. (emphasis in original).

The Petitioners sought rehearing, which was denied on September 20, 2007. *Pet. App.* a64-a65. Petitioners again contended that *Burford* abstention is applicable notwithstanding Respondents' claims that Sections 12-21-2710 and 12-21-2712 are unconstitutional. Moreover, Petitioners argued that this Court's summary affirmance in *Holliday v. State*,

335 U.S. 803 (1948), (affirming 78 F.Supp. 918 (W.D.S.C. 1948)), which upheld a three-judge court's determination that similar predecessor provisions of these South Carolina statutes do not violate the Due Process and Equal Protection Clauses, strongly supports *Burford* abstention. *Id.* at a114-a130. The time for filing having been extended by the Court, our Petition is timely.

South Carolina Gambling Law

South Carolina long ago sought to prohibit gambling devices. In 1931, the Legislature enacted a comprehensive ban in what is now Sections 12-21-2710 and 12-21-2712. These provisions, with certain exceptions, remain today largely unchanged. *Westside Quik Shop v. Stewart*, 341 S.C. 297, 300-302, 534 S.E.2d 270, 271-272, (2000), *cert. den.* 531 U.S. 1029 (2000) [history of statutes discussed]. The additions, since 1931, largely focus upon video poker. Following extensive debate, Act No. 125 was enacted in 2000, and added video poker and other video games to the statutes' ban. Pursuant to the statute, slot machines, video poker machines, keno, blackjack, and other devices "pertaining to games of chance," are declared illegal *per se*.[1] Possession constitutes a crime, and law

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[1] As noted above, in 2000, by Act No. 125, the Legislature amended the statute to add video poker machines ["video game machine with a free play feature operated by a slot or thing of value"] and other video games such as blackjack, keno, lotto, bingo or craps. However, except for minor consolidations, the remainder of Section 12-21-2710, including the language "pertaining to

(continued...)

enforcement is authorized to seize such devices and take them to a magistrate for determination of illegality. The magistrate must order devices deemed illegal under Section 12-21-2710 destroyed.[2]

An owner may seek a post-seizure hearing to contest the magistrate's initial determination of illegality. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Forfeiture is machine-by-machine before the magistrate – the exclusive forum for such matters. *Allendale County Sheriff's Office*, 361 S.C. *supra* at 587, 606 S.E.2d *supra at* 474. The owner may appeal to the circuit court, and then to the appellate courts. *Mims Amusement Co. v. SLED, supra.* The statutes' purpose is clear: forfeiture of gambling devices "serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." *Westside*, 341 S.C., *supra* at 304, 534 S.E.2d *supra* at 273 (2000), citing *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

In 1948, a wide-ranging constitutional attack was launched in federal court against these statutes. In *Holliday v. State*, *supra*, plaintiff sought to enjoin these virtually identical statutes as violative of the Due Process and Equal Protection Clauses, alleging the

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[1](...continued)
games of chance," has been present since 1931.

[2] The language of Section 12-21-2712 has remained virtually unchanged since 1931.

laws "unconstitutional, null and void and in violation of the Fourteenth Amendment of the United States Constitution." 78 F.Supp., *id.*, at 921. A three-judge court upheld the anti-gambling statutes as constitutional, as "clearly a valid exercise of the police power of the State of South Carolina, and constitute[ ] no attempt on the part of the state to deprive plaintiff of his property without due process of law." *Id.* at 925. According to the three-judge court, "[t]he General Assembly of South Carolina, under its police power, had the right to declare such machines gambling machines *per se*, and as such illegal in the State of South Carolina." *Id.*

Holliday also contended before this Court that these statutes violate both Due Process and Equal Protection. See, *Pet. App.* a131-a160. (Appellant's Jurisdictional Statement and Brief). *Holliday's* arguments, like Respondents', were that the statutes arbitrarily deprived him of innocent property by declaring his particular gaming devices contraband *per se* and thus subject to destruction pursuant to present § 12-21-2712. *Id.* at a138. However, this Court summarily affirmed the three-judge court, thus finding the statutes constitutionally valid. 335 U.S. 803 (1948).

Sections 12-21-2710 and 12-21-2712 and its predecessors have been consistently enforced and upheld by the state Supreme Court. Over the decades, much case law regarding these provisions' applicability and constitutionality has been adjudicated. See, *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932); *Alexander*

v. Martin, 192 S.C. 176, 6 S.E.2d 20 (1939); *State v. Appley*, 207 S.C. 284, 35 S.E.2d 835 (1945); *Ingram v. Bearden*, 212 S.C. 399, 47 S.E.2d 833 (1948); *Squires v. SLED*, 249 S.C. 609, 155 S.E.2d 859 (1967); *State v. DeAngelis*, 257 S.C. 44, 183 S.E.2d 906 (1971); *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995); *State v. One Coin Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443 (1996); *State v. 192 Coin-Operated Video Game Machines, supra*; *Allendale County Sheriff's Office v. Two Chess Challenge II, supra*; *Westside, supra*; *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004); *Mims Amusement Co. v. SLED, supra*. These cases have addressed the statutes' conformity with procedural due process (*State v. Kizer, supra*; *State v. 192 Coin-Operated Video Game Machines, supra*); alleged vagueness (*State v. DeAngelis, supra)*; purported Equal Protection violations (*State v. 192 Video Game Machines, supra*; *Sun Light, supra)*; trial by jury (*Mims Amusement Co., supra*); and the statutes' alleged unconstitutional "taking" *(Westside, supra)*. The statutes have been applied to slot machines, pin ball machines, remnants of machines, and video games. Over the years, the state Supreme Court has diligently applied these gaming statutes consistently with the federal Constitution.

REASONS FOR GRANTING THE PETITION

Summary of Argument

In this case, the Fourth Circuit panel, by a 2-1 split, reversed the District Court's decision to abstain

under *Burford*. Essentially, the panel's majority found abstention unwarranted, premised upon the illogic that, because Respondents allege the forfeiture statutes are facially unconstitutional as vague and discriminatory, *Burford* is inapplicable. In the circumstances of a 'facial" attack upon the State's regulatory scheme, concluded the majority, federal court intervention does not "possibly threaten [the] ... *uniform* application" of the State's regulatory scheme. *Pet. App.* a15 (emphasis in original).

The majority thus created a new exception to the *Burford* doctrine, an exception which this Court has rejected, and one which is inconsistent with decisions in other circuits. Indeed, it did so, mindful that this Court previously concluded in *Holliday, supra* that the similar predecessor forfeiture statutes to South Carolina's amended version do *not* violate the Due Process and Equal Protection Clauses. These are the very constitutional provisions which Respondents assert here, and it is these provisions which form the basis for the majority's "facial" exception to *Burford*.

With the panel's ruling, Respondents and other federal plaintiffs may now avoid the state forfeiture process altogether, as well as disregard state court interpretations concerning that process. See, *e.g. Allendale, supra*. It is evident Respondents do not like these state court decisions such as requiring "machine by machine" forfeiture adjudicated in a post-seizure proceeding. *Pet. App.* a77. [alleging Respondents' desire to market a "legal" machine in South Carolina]. Now, armed with a well-crafted complaint, machine

owners and other plaintiffs may proceed directly to federal court, having bypassed the state enforcement scheme on the basis that the federal Constitution insures a right to place machines on the market prior to a forfeiture proceeding. Such avoidance of the state forfeiture process upends the abstention doctrine and undermines the structure of federalism it preserves.

Here, in reversing the District Court's decision to abstain under *Burford*, the majority rejected the lower court's concern for avoiding entanglement in the intricacies of state gambling law. Instead, the majority found that since Respondents' claims constitute a "direct attack on the constitutionality of a statute, 'the kind of controversy federal courts are particularly situated to adjudicate ...,'" such claims "are not proper candidates for *Burford* abstention." *Pet. App.* a19-a20. However, in dissent, Judge Wilkinson astutely rejected the non-existence of any rule exempting "facial" claims, stating that the Fourteenth Amendment has not "reordered" federal and state relations "as to render *Burford* abstention virtually inapplicable to all constitutional challenges in federal court to specialized regulatory schemes." *Pet. App.* a28.

I. OVERVIEW OF THE CASE

This case invokes the fundamental principle of "Our Federalism" established by the Founding Fathers. At stake is South Carolina's ability under our federal system to perform the core state function of regulating gambling – through a system of seizure and forfeiture of contraband gambling devices and other "games of chance" – without intrusion by the federal courts.

South Carolina has had its forfeiture system proscribing slot machines and other "games of chance" in place since 1931. In 2000, after much debate and deliberation, the forfeiture statutes were amended by the South Carolina legislature to add "video poker" and other video games to the statutes' previous longstanding ban. In addition, in recent years, the state Supreme Court has further clarified these statutes, concluding that owners of seized machines are entitled to a post-seizure (not a pre-seizure) hearing, and that forfeiture is "machine-by-machine." In other words, legality under state law is not determined upon the basis of an entire class or category of machines, but only those individual machines seized and brought before the magistrate are adjudged. *Allendale, supra*; *Mims, supra*.

Justice Kennedy perhaps said it best: America's dual sovereignty structure is a work of "genius," premised upon the idea that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995), (Kennedy, J. concurring). Abstention protects these sacred values, thus enabling federal courts to exercise "wise discretion" by restraining "their authority because of 'scrupulous regard for the rightful independence of state governments ....'" *Burford*, 319 U.S., *supra* at 332. A federal court, in employing its equitable powers, thus may refrain from exercising jurisdiction if, upon balancing federal and state interests involved, determines "the State's interests are paramount and ... a dispute would best be adjudicated

in a state forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Such circumstance warranting abstention includes the "avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships." *La. Power and Light Co. v. Thibodaux*, 360 U.S. 25, 32 (1959) (Brennan, J. et al. dissenting).

The abstention doctrine, as articulated through the decisions of this Court, does not recognize a "facial" constitutional claim exception, as the majority created, particularly where, as here, questions of racial discrimination or other fundamental rights are not involved, and a timely and adequate mechanism to review violations of any constitutional rights is available. *Compare, McNeese v. Bd. of Ed.*, 373 U.S. 668 (1963). To exempt altogether such constitutional claims effectively disregards the State's interest, embroils federal courts in the State's "internal affairs," thereby undermining the principle of federalism. *McNeese, Id.* at 677 (Harlan, J. dissenting). As Justice Rehnquist wrote in *Moore v. Sims*, 442 U.S. 415, 427 (1979), "[t]he breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it." (emphasis in original).

Martin v. Creasy, 360 U.S. 219, 224 (1959) recognizes that there is no broad rule eliminating abstention, as the majority fashioned. In *Creasy*, even though the lower court enjoined the State's administrative scheme as violative of Due Process, abstention was required to "avoid[ ] ... the unnecessary impairment of state functions." *Quackenbush, supra*

also cautioned that a rigid, "per se" approach to *Burford's* applicability is inconsistent with *Burford's* flexibility. 517 U.S., *supra* at 730. *See also, Younger v. Harris*, 401 U.S. 37, 45 (1971) [state courts are competent to address the constitutionality of state statutes]; *Harrison v. NAACP*, 360 U.S. 167, 176 (1959) [notwithstanding "facial" claims, abstention warranted to avoid "unnecessary interference by the federal courts with proper and validly administered state concerns."]; *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 814 (1976) ["[i]t is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."]. Accordingly, this case raises the critical question of whether *Burford* is avoided merely by alleging "facial" unconstitutionality of the governing statutory scheme or, instead abstention is determined by carefully balancing the federal and state interests involved.

In not balancing these interests, the majority's decision is especially troubling. First, is the adverse effect upon the State's deterrence of gambling – its core function. For decades, without interruption, South Carolina has discouraged gambling by criminalizing gambling devices and "games of chance" and forfeiting them as contraband *per se*. Now, that core state process is threatened by a federal action seeking to bypass the rulings of the South Carolina Supreme Court determining the manner in which that forfeiture system operates under state law.

Secondly, *New Orleans Public Service Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (NOPSI) recognized that *Burford* is particularly applicable where the constitutional challenge is "of minimal federal importance ...." This Court's summary affirmance in *Holliday v. State, supra* – upholding the almost identical predecessor South Carolina statutes to those attacked here, against similar constitutional challenges – should have convinced the majority to revisit its establishment of any "facial" exception to *Burford*. Disregard of *Holliday's* controlling impact undermines respect for this Court's precedents.

Moreover, the majority's decision is at odds with those in other circuits. These rulings essentially recognize that *Burford's* applicability depends not upon the claim alleged, but upon the proper balancing of federal and state interests involved and the assurance that the state procedures adequately protect constitutional claims. Other courts have concluded *Burford* is applicable, notwithstanding constitutional challenges to statutes, regulations, court rules, or local ordinances. Where the state's regulation of gambling is the subject of inquiry in federal court, *Burford* abstention has been considered particularly warranted. See, *Johnson v. Collins Entertainment Co.*, 199 F.3d 710, 720 (4th Cir. 1999) [deterrence of gambling lies "at the heart of the state's police power."]; *Chun v. State of N.Y.*, 807 F.Supp. 288, 292 (S.D.N.Y. 1992) ["(t)he scope of laws regulating gambling and lotteries is clearly a matter of predominately local concern."]

Thus, as dissenting Judge Wilkinson recognized,

Burford's applicability "in the most sensitive areas of state sovereignty [is] an issue that has been rife with conflicting approaches." *Pet. App.* a25. Unless this Court squarely addresses abstention's applicability when a "facial" constitutional challenge is made to a state regulatory regime, *Burford's* doctrine is undercut and respect for state sovereignty undermined. The majority's decision leaves the fate of abstention in the hands of the creative drafter of the complaint, who can avoid state processes by alleging the entire regulatory regime is constitutionally defective. As Judge Wilkinson observed, the majority's decision sends the "troubling message" that the abstention doctrine can be "skirt[ed]" by "characterizing claims such as this as mere facial challenges." *Pet. App.* a43.

II. THE MAJORITY'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT REGARDING *BURFORD* ABSTENTION.

A. *BURFORD* AND ITS PROGENY

In *Burford* and its progeny, this Court has ordered abstention notwithstanding the assertion of constitutional claims. *Burford*, itself involved a due process claim. Yet, this Court concluded abstention was warranted, explaining that

> [a]lthough a federal equity court does have jurisdiction of a particular proceeding, it may in its sound discretion, whether its jurisdiction is invoked on the grounds of diversity of citizenship *or otherwise*, 'refuse to enforce or protect

> legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'

319 U.S., *supra*, at 317-318 (emphasis added). Importantly, the state provided a "unified method for the formation of policy and determination of cases by the Commission and by the state courts." *Id.* at 333-334. Judicial review of the Railroad Commission's order was "expeditious and adequate." *Id.* at 334.

Burford's doctrine was reaffirmed in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341 (1951). Again, a due process claim was raised. Nevertheless, the Court required abstention, explaining that

> [e]quitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts ... is convinced that the asserted federal right cannot be preserved except by the extraordinary relief of an injunction in the federal courts.' ... Whatever rights appellee may have are to be pursued through the state courts.

Id. at 349-350.

And, *Martin v. Creasy, supra,* as here, involved a constitutional challenge to a statute as written. In reversing the three-judge court's enjoining of the highway access statute as violative of the Fourteenth Amendment, the Court concluded that "[t]he circumstances which should impel a federal court to abstain from blocking the exercise by state officials of their appropriate functions are present here in a marked degree." 360 U.S., *supra* at 224. Emphasizing that the state statute provides a "procedure through which the full measure of [plaintiffs'] ... rights under the United States Constitution will be preserved ...," the Court abstained. Abstention was based upon "the unnecessary impairment of state functions."[3] *Id.*

NOPSI, supra clarified *Burford.* There, abstention was deemed inappropriate to a challenge that a rate order was federally pre-empted. *NOPSI* summarized the "*Burford* doctrine" as follows:

> [w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there

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[3] *Creasy* is a form of "*Burford* type abstention. ..." *BT Inv. Managers, Inc. v. Lewis,* 559 F.2d 950, 955 (5th Cir. 1977); Wright, Miller and Cooper, 17A *Federal Practice and Procedure* § 4244 [citing *Creasy* as a *Burford* type case]. *See also, Great Lakes Dredge and Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943) ["It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."]

> are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar"; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S., *id.* at 361, quoting *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. *supra*.[4]

B. *NOPSI* DOES NOT RENDER *BURFORD* ABSTENTION UNWARRANTED HERE

Contrary to the Fourth Circuit's suggestion otherwise, *Pet.* App. at a18, *NOPSI* does not disqualify Respondents' constitutional claims as a "candidate" for *Burford* abstention. This Court's two-pronged test specified in *NOPSI* for *Burford* applicability is alternatively stated, such that "*Burford* does not require unclear questions of state law." Davies, "Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases," 20 *U.C. Davis L.R.* 1, 11 (1986). Nor does *NOPSI* suggest in this test that "facial" constitutional claims are not subject to *Burford*. The key question for *Burford* abstention is instead whether adjudication in federal court would "unduly intrude into the processes

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[4] In *Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992), this Court suggested that *Burford* is applicable to *judicial proceedings*, as well as administrative.

of state government or undermine the State's ability to maintain desired uniformity." 491 U.S. *id.* at 363.

Thus, *NOPSI* lends no comfort to the Fourth Circuit's creation of a "facial" exception to *Burford.* Importantly, *NOPSI's* "facial" claim was based upon preemption of an order, rather than a "facial" constitutional claim. There is a considerable distinction between the two. *See, Chiropractic America v. Lavecchia,* 180 F.3d 99, 108 (3d Cir. 1999) [distinguishes preemption from a "facial" constitutional attack; "[a] reviewing federal court would be required to delve beyond the text of the regulations to adjudicate Appellants' constitutional claims."]. Moreover, it is rare that a "facial" claim sweeps away an entire statute. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) [Partial, rather than facial invalidation, is the "normal rule."]; *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ["... when confronting a constitutional flaw in a statute, we try to limit the solution to the problem."].

Here, discriminatory enforcement is alleged. As stated in *United States v. Armstrong*, 517 U.S. 456, 466 (1996), a discriminatory enforcement claim is "not based on the ground [the statute] is unconstitutional on its face," but challenges "the manner of its administration." Such a claim is, therefore, generally a mixed question of law and fact. Unlike *NOPSI*, this claim cannot be adjudicated based upon a purely "facial" analysis.[5]

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[5] Moreover, unlike *NOPSI*, Respondents, in reality, allege certain state law violations as well as constitutional claims. They (continued...)

Likewise, Respondents other Due Process and Equal Protection contentions cannot be characterized solely as "facial" claims. A facial vagueness claim "means a claim that the law is 'invalid in *toto*' – and therefore incapable of any valid application." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n. 5 (1982). As *United States v. Mazurie*, 419 U.S. 544, 550 (1975) emphasizes, "... vagueness challenges to statutes which do not involve First Amendment freedoms must be examined *in the light of the facts of the case at hand*." (emphasis added). Respondents' Due Process and Equal Protection claims are thus not "facial" in *NOPSI's* sense. *Holliday, supra* clearly demonstrates that Respondents cannot "establish that no set of circumstances exists under which ... [these] Act[s] would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

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[5](...continued)
assert that "[d]efendants have permitted the possession and operation of devices pertaining to games of chance that have been specifically ruled illegal in prior judicial rulings in video arcades catering to young children ...." *Pet. App.* a76. Yet, Section 12-21-2712 requires law enforcement officers to seize "any" illegal machine or device and take before the magistrate. While Respondents characterize their claim as Equal Protection-based, they also are alleging a state law violation. Moreover, Respondents' complaint asserts the goal to design and manufacture "a legal video amusement machine to be operated within the State of South Carolina," yet are "unwilling" to "risk" prosecution and seizure. *Pet. App.* at a77. In effect, Respondents argue that their machines – in contrast to others' – are "legal" under state law, i.e. not "games of chance." Thus, their contention is essentially that the state may misperceive the nature of their machines and thus "misappl[y] its lawful authority," or that the State will not "properly weigh relevant state law factors ...." *NOPSI*, 491 U.S. at 362.

Judge Wilkinson correctly recognized that Respondents' claims are not "facial." He noted that the essence of Respondents' claims are for discriminatory enforcement and to support such claim they desire extensive discovery. *Pet. App.* a43-a45. In his view, the majority "exalts form over substance ...," *Id.* at a42, in characterizing Respondents' equal protection claim as "facial":

> ... plaintiffs' equal protection challenge inevitably requires a detailed probing of South Carolina's enforcement scheme. Thus, it was clearly not an abuse of discretion to abstain from adjudicating this claim. Plaintiffs not only ask a federal court to pass upon the rationality of South Carolina's strategy for enforcing its gambling laws, but also seek to delve into the strategy's details. Such an undertaking would inevitably require the federal court to interpret and apply the state statute to various individualized decisions made by the state in the enforcement of its gaming laws.

Pet. App. a43-a44.

Moreover, as Judge Wilkinson noted concerning Respondents' "vagueness" claim, "... federal court involvement here will interfere with the detailed, individualized analysis required to determine what constitutes a 'game of chance' and will inescapably intrude upon South Carolina's regulatory system." *Id.* at a36. And, with regard to Respondents' contention that a pre-seizure mechanism is constitutionally

required, he recognized that in areas of traditional local control, "'state courts are fully competent to adjudicate constitutional challenges to local ... decisions.'" *Id.* at a47. Thus, unlike *NOPSI*, which involved a truly "facial" claim, Respondents' claims are clearly "entangled in a skein of state law" which must be untangled before any federal action can proceed. 491 U.S. at 362. In essence, Respondents' federal action is based upon a desire to "design and manufacture a legal video amusement machine [under state law] to be operated within the State of South Carolina ...." *Pet. App.* at a77. A federal court, faced with their Due Process and Equal Protection claims, will inevitably become enmeshed in the details of South Carolina's anti-gambling statute and invariably must apply the State's "game of chance" requirement to a specific factual situation. Such intrusion by the federal judiciary significantly threatens the State's interest in maintaining uniformity in the treatment of an "essentially local problem ...." *Alabama Pub. Serv. Comm'n.*, 341 U.S., *supra* at 347.

As stated, South Carolina enforces its gambling laws, based upon a "machine by machine" forfeiture analysis. An amusement machine can instantly become an illegal *per se* gambling device with a slight computer modification. *Allendale, supra.* Thus, as *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) states, the "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." Where "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equity power and state administration of its own law.'" *Rizzo*

v. Goode, 423 U.S. 362, 378 (1976).

For all these reasons, the Fourth Circuit's reliance upon *NOPSI* or other cases for its novel "if facial constitutional claims are alleged, no possible threat to uniformity is imposed" reasoning is entirely misplaced. Indeed, such analysis is at odds with this Court's decisions regarding the applicability of abstention to constitutional claims. *Moore v. Sims, supra*, although a *Younger* abstention case, is highly instructive. There, abstention was warranted even though Plaintiffs facially attacked provisions of Texas law authorizing emergency custody of children. As the Fourth Circuit did here, the District Court refused to abstain, intimating that Plaintiffs' challenge to the entire Texas statutory scheme as unconstitutional rendered abstention inapplicable. Justice Rehnquist demonstrated why such reasoning is flawed:

> [t]hus, the District Court suggests that the more sweeping the challenge the more inappropriate is abstention, and thereby inverts traditional abstention reasoning. The breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it. This is evident in a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government in federal court interpretation and subsequent

> invalidation of parts of an integrated statutory framework.

442 U.S., *supra* at 427 (emphasis in original). While *Moore* involved *Younger* abstention, *Burford* and *Younger* are closely related. *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 915 (S.D. Ohio 2004). *See also, NOPSI*, 494 U.S. *supra* at 365 ["... the mere assertion of a substantial federal constitutional challenge to state action will not alone compel the exercise of federal jurisdiction."].

C. THE MAJORITY CREATED AN EXCEPTION TO *BURFORD* UNRECOGNIZED BY THIS COURT

Accordingly, in fashioning an exception to *Burford* for "facial" constitutional claims, the majority wrongly applied *Burford* cases, including *NOPSI*. Again, *Quackenbush, supra*, rejects a "rigid" or "*per se*" approach to *Burford*. While *Burford* requires a "balance [which] only rarely favors abstention," still, that "balance" must be made.[6] It is error to determine

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[6] True, the Court of Appeals ostensibly applied the test for *Burford* abstention articulated in *NOPSI*, *See*, 491 U.S. at 361-363. Yet, clearly the so-called "facial" attacks Respondents make against South Carolina's statutes drove the majority's analysis. Moreover, as Judge Wilkinson noted, the majority's conclusion that no difficult questions of state law are here involved is incorrect. The District Court, faced with Respondents' vagueness claims, will inevitably become enmeshed in applying the statutes "pertaining to games of chance" language on a machine-by-machine basis as state law requires. Further, concerning Respondent's claim that no mechanism for advance approval of a class of machines exists, the District Court will again run

(continued...)

that an attack upon the statutes "as written" results in *Burford* abstention's inapplicability. Although the fact that a state policy may be overturned is no reason to abstain, 491 U.S., *supra*, at 363, a "facial" constitutional attack upon a state policy or state regulatory statutes *is no reason not to abstain. See, Creasy, supra*; *Moore v. Sims, supra, Colorado River*, 421 U.S., *supra* at 815, n. 14 [Although the burden may be greater, *Burford* may apply, even where there is "a federal basis for jurisdiction."] Rather than concluding that "facial" constitutional attacks upon the state's regulatory scheme are not "proper candidates" for *Burford*, a federal court must carefully balance federal and state interests, determining whether "the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Quackenbush.*, 517 U.S. *supra* at 728.

The majority failed to engage in such balancing, giving no weight to the fact that state law assigns to a magistrate the determination of legality of all gambling devices seized, subject to timely and adequate judicial review. Instead, the Court severely devalued the State's interest in prohibiting gambling and in maintaining uniformity in that deterrence – by placing all emphasis upon Respondents' "facial" claims. And, by discounting completely the inevitable entanglement of Respondents' claims with South Carolina's regulatory anti-gaming scheme aimed at "games of chance," the majority was also unfaithful to *Burford*. Such an analysis undermines the flexibility which *Burford* encourages and thwarts the principles

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[6](...continued)
headlong into the machine-by-machine requirement of state law.

of federalism and comity which *Burford* protects.

III. THE MAJORITY'S DECISION FURTHER ADDS TO THE CONFUSION IN LOWER FEDERAL COURTS REGARDING *BURFORD'S* APPLICABILITY, AND IS INCONSISTENT WITH DECISIONS IN OTHER CIRCUITS AS WELL AS THE FOURTH CIRCUIT.

Judge Wilkinson's dissent expressed concern about the reigning confusion in the lower federal courts over *Burford's* applicability, noting that the "issue [is] rife with conflicting approaches." *Pet. App.* a25. Other commentators agree wholeheartedly with his assessment. As one authority has observed, "[c]onfusion over the scope of *Burford* abounds ...." Young, "Federal Court Abstention and Administrative Law From Burford to Ankenbrandt," 42 *DePaul L. Rev.* 859, 866 (1993). And, as another commentator has written,

> [m]uch confusion surrounds the factors federal courts should consider in deciding whether to grant *Burford* abstention ... . Supreme Court formulations of *Burford* have been abstract, leading to a variety of views concerning its requirements among the federal circuits.

Wise and Christensen, "Sorting Out Federal and State Judicial Roles In State Institutional Reform: Abstention's Potential Role," 29 *Fordham Urb. L. J.* 387, 399 (2001). By adopting a "*per se*" rule for so-called "facial" challenges, the majority compounds the

confusion dramatically.

Decisions in other circuits disagree with the Court of Appeals' "facial" exception. For example, the Fifth Circuit has stated quite clearly in *Sierra Club v. City of San Antonio*, 112 F.3d 789, 795 (5th Cir. 1997) that "*Burford* abstention does not so much turn on whether the plaintiff's cause of action is alleged under federal or state law, as it does on whether the plaintiff's claim may be 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed.'" And, in *Capital Bonding Corp. v. New Jersey Supreme Court*, 127 F.Supp.2d 582 (D.N.J. 2001), the District Court abstained under *Burford* notwithstanding that Plaintiff's claim constituted a "facial challenge" to a New Jersey Supreme Court rule for notice and removal of insurers from the New Jersey Bail Registry. The Court noted that "[w]e are thus presented with murky federal constitutional claims of questionable merit." *Id.* at 595. Finding that the "Plaintiff has ample opportunity for review of the new Rule and any implementation thereof," *Id.*, at 594, the Court relied upon the Third Circuit's decision in *Chiropractic America v. Lavecchia*, *supra*, in abstaining under *Burford*. Quoting *Lavecchia*, which involved *Burford* abstention in the context of constitutional challenges to chiropractic regulations, the *Capital Bonding* Court stated that

> "... certain matters are of state concern to the point where federal courts should hesitate to intrude; and they may also concern judicial 'economy,' the notion that courts should avoid making duplicate efforts or unnecessarily deciding difficult

questions."

127 F.Supp.2d at 591, quoting *Chiropractic America*, 180 F.3d at 103 (quoting *Bath Memorial Hospital v. Maine Health Care Fin. Comm.*, 853 F.2d 1007, 1012 (1st Cir. 1988)).

An earlier Fourth Circuit decision, *Fralin and Waldron, Inc. v. Martinsville*, 493 F.2d 481 (4th Cir. 1974) is also inconsistent with the Court of Appeals' reasoning in this case. *Fralin* involved a constitutional challenge to a zoning ordinance. As here, Plaintiff's claims raised questions of vagueness and arbitrary enforcement. Yet, the Fourth Circuit required abstention, because state adjudication would "avoid needless friction in federal-state relations over the administration of purely state affairs." 493 F.2d, *Id.* at 483. *See also, Russell v. Giles County*, 105 F.Supp.2d 841, 848 (M.D. Tenn. 2000) [the Court abstained under *Burford* even though constitutional claims were mounted against the Tennessee Public Indecency Act.]; *Int'l. Eateries of America, Inc. v. Bd. of County Commrs.*, 838 F.Supp. 580 (S.D.Fla. 1993) [*Burford* abstention warranted in suit challenging constitutionality of adult entertainment ordinance].

Another case, *Jernigan v. State of Miss.*, 812 F.Supp. 688 (S.D. Miss. 1993), referenced by Judge Wilkinson in his dissent, is also highly instructive. While not directly involving *Burford* abstention, this case employed an abstention approach which is the polar opposite of the Fourth Circuit's reasoning. *Jernigan* involved the application of a gambling statute similar to Sections 12-21-2710 and 12-21-2712. Plaintiff sued in federal court claiming his machines

were legal under Mississippi law and their use thus protected by the federal Constitution. Seizure of his machines, he argued, deprived him of property without due process.

The District Court, however, abstained under *Younger v. Harris*, *supra*. Relying upon a similar Third Circuit decision, *Pennsylvania Video Operators v. U.S.*, 731 F.Supp. 717 (W.D. Pa. 1990), *affd.*, 919 F.2d 136 (3d Cir. 1990), the Mississippi Court concluded as follows:

> ... Jernigan claims that he will lose money if state or federal law enforcement officials seize his video poker machines. However, the court ... does not view this as "a potential irremediable constitutional violation of sufficient magnitude to warrant the interference of this court in either state or federal law enforcement."
>
> ... [N]either can declaratory relief properly be granted .... [P]laintiff alleges ... that his due process right to "a hearing, prior to the seizing of [his] equipment or personal property" is threatened ... by criminal proceedings. Defendants argue, *inter alia*, that plaintiff has no property interest in his video poker machines and that ... his due process rights could not be implicated by any seizure of those machines. Jernigan does not dispute that the ownership, possession, control or transportation of machines such as his

> could be declared illegal by the state legislature or by Congress as a valid exercise of government police powers. Nor does he dispute that he would not have a property interest in the machines if they had been declared illegal by these statutes. His claim appears to be simply that his machines are not, in fact, "gambling devices" within the meaning of any of the subject statutes. ... [H]e wants an injunction against defendants' seizing his machines or prosecuting him for his ownership of these machines. It is apparent from the record in this case that the question whether a particular machine is a "gambling device" depends, under either state or federal law, on the various features of the machine.... [C]onsideration of the various characteristics of each game and machine is the core of analysis under the statute.

812 F.Supp. at 692-693. The Court's reasoning in this case vividly illustrates why Judge Wilkinson's dissent was correct. Without abstention, the federal court inevitably will be required to plunge headlong into the thicket of South Carolina gambling law. A federal district judge will necessarily function as a "super magistrate" in this case.

Accordingly, the lower federal courts do not read *Burford* consistently. This Court should reconcile these varying approaches.

IV. *BURFORD* ABSTENTION IS ESPECIALLY APPLICABLE HERE BECAUSE OF THIS COURT'S SUMMARY AFFIRMANCE IN *HOLLIDAY*, WHICH REJECTED SIMILAR CONSTITUTIONAL CHALLENGES MADE AGAINST THE VIRTUALLY IDENTICAL SOUTH CAROLINA STATUTES IN QUESTION IN THIS CASE.

A. *HOLLIDAY* DECISION

The State's interest in having this case "adjudicated in a state forum" is substantially enhanced by this Court's summary affirmance decision in *Holliday*, *supra*. Undoubtedly, the "minimal" nature of the constitutional question was important in the *Burford* decision to abstain. *NOPSI*, 491 U.S., *supra* at 361.

Likewise, based upon *Holliday*, the Respondents' constitutional issues are of "minimal federal importance." For purposes of Respondents' claims, the similar predecessors to the current South Carolina forfeiture statutes were upheld as constitutional against Due Process and Equal Protection Clause challenges – Respondents' same claims here. *Pet. App.* a68-a81. Like Respondents, Holliday brought a pre-enforcement federal action to enjoin these provisions. Holliday claimed these South Carolina statutes were

> unconstitutional, null and void and in violation of the Fourteenth Amendment ..., because the statutes treat, embrace, regard and include the same coin-operated amusement machines of the

> plaintiff as gambling devices *per se* and subject them to seizure and destruction as gambling devices *per se* although they are ultimately innocent and are not gambling devices *per se*; that their intended seizures and destruction, or any seizures and destruction of them are and would be, in violation of plaintiff's constitutional rights ....

78 F.Supp. at 921. As today, South Carolina law then banned devices "pertaining to games of chance of whatever name or kind." Moreover, the statutes in *Holliday* mirrored present § 12-21-2712, requiring law enforcement to seize machines and take before a magistrate for review and subsequent destruction.

A three-judge Court concluded that Holliday's machines were "games of chance" because they "do not give a certain uniform return value for each coin deposited." *Id.* at 925. Thus, the federal question was whether South Carolina's anti-gambling laws violated the Fourteenth Amendment. Concluding that "South Carolina's policy is to suppress gambling," which "is illegal in South Carolina," *Id.* at 921, the three-judge court held that the forfeiture statute is "clearly a valid exercise of [South Carolina's] ... police power ... and constitutes no attempt on the part of the State to deprive plaintiff of his property without due process of law." *Id.* at 925.

Holliday appealed to this Court (Appellant's *Jurisdictional Statement*, *Pet. App.* a131-a139), asking whether the South Carolina anti-gambling statutes violated the Due Process and the Equal Protection

Clauses. *Id.* at a138. Holliday's *Jurisdictional Statement* asserted that the gambling statute "has no basis, is arbitrary and denies to the plaintiff his fundamental rights under the equal protection of the law clause and due process of law clause under [the] ... 14th Amendment...." *Id.* This Court, however, expressly affirmed the three-judge Court. 335 U.S. 843, *supra.*

B. EFFECT OF *HOLLIDAY*

In *Mandel v. Bradley*, 432 U.S. 173, 176, (1977), this Court stated that

> [s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by these actions.

And, in *Hicks v. Miranda*, 422 U.S. 332, 340 (1975), a summary affirmance sustained "the constitutionality of the very California obscenity statute ..." before the Court. *Hicks* held it error to disregard this Court's decision because, where the issues "are substantially the same," the summary affirmance is dispositive. *Id.* at 345, n. 14. The Court also has concluded that determination of whether particular issues are "fairly comprised" within the *Jurisdictional Statement's* questions is "not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559, n. 6 (1978). *See also, Comm. Party v.*

Whitcomb, 414 U.S. 441, 451, n. 1 (1974) (Powell, J., et al., dissenting) [jurisdictional statement "'to include every subsidiary question fairly comprised therein....'"].

Accordingly, *Holliday* concluded that South Carolina statutes, similar to their current version, are valid under the Due Process and Equal Protection Clauses. Such ruling includes upholding the very statutory language Respondents attack as vague – "pertaining to games of chance of whatever name or kind." Respondents' constitutional claims are thus "fairly included" within *Holliday's* issues decided. While Respondents assert a "void-for-vagueness" claim, it is virtually the same one Holliday made here – that "plaintiff's business [selling alleged gaming devices] is inherently innocent ...." *Pet. App.* a131-a160, a138. Holliday argued that South Carolina's forfeiture statutes in making games of chance illegal *per se* "is arbitrary and denies to the plaintiff his fundamental rights under the equal protection clause and due process of law clause ...." *Id.*

Generally, laws designating "innocent" conduct criminal are candidates for void-for-vagueness claims. *See, City of Chicago v. Morales*, 527 U.S. 41, 53 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972). Moreover, "'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Gonzales v. Carhart*, ___ U.S. ___, 127 S.Ct. 1610, 1616 (2007), quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In *Holliday*, this Court rejected arguments that the statutes' breadth permitted

the arbitrary and discriminatory punishment of innocent conduct. By summarily affirming the three-judge court, the Court allowed the State to proceed against Holliday's machines. If this Court had thought that the phrase "pertaining to games of chance" was unconstitutionally vague in violation of the Due Process Clause – a Clause Holliday asserted the statutes violated – the three-judge court's judgment would not have stood. Indeed, the three-judge court defined "games of chance" as those not giving "a uniform return for each coin deposited." 78 F.Supp. at 925. Neither this Court nor the three-judge court deemed such a definition unconstitutionally vague.[7]

Further, Respondents' constitutional challenge to lack of a pre-enforcement mechanism was also necessarily decided in *Holliday*. Indeed, at the time *Holliday* was adjudicated, both federal and state courts had ruled – in accordance with *Lawton v. Steele*, 152 U.S. 133 (1894) – that an owner whose machines were seized pursuant to the South Carolina statute was entitled to no pre-seizure hearing under the Due Process Clause. *See*, *Durant v. Bennett*, 54 F.2d 634 (W.D.S.C. 1931) [judicial intervention after seizure is constitutionally sufficient]; *State v. Kizer*, *supra* [same], overruled in part by *State v. 192 Coin-Operated Video*

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[7] The three-judge court relied upon previous interpretations of the state Supreme Court, such as *Alexander v. Martin*, *supra*. For purposes of vagueness, this Court has recognized that such claims must be adjudged in light of the statute's construction by the highest court of the State. *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973). Thus, there has never been any difficulty in construing the statute's language and this Court in *Holliday*, having *Alexander v. Martin* before it, saw no such difficulty.

Game Machines, supra [post-seizure hearing required, based upon *Calero-Toledo v. Pearson Yacht Leasing Co*, 416 U.S. 663 (1974)]. Whether Respondents' contentions are based upon Equal Protection or procedural Due Process, *Holliday* necessarily disposed of the claim by allowing state enforcement to proceed.

In short, the claims in *Holliday* and this case are essentially the same – that South Carolina statutes arbitrarily punish innocent conduct ("legal" machines). Yet, *Holliday* found no Due Process or Equal Protection violations in these statutes.[8] Nevertheless, the majority still refused to invoke abstention even though *Holliday*

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[8] Also, the Court has spurned the Due Process and Equal Protection arguments which Respondents make in this case in the specific context of treatment of contraband *per se* and the regulation of gambling. A state is afforded considerable constitutional leeway in the exercise of its police power to regulate gambling. *See, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986); *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) ["gambling ... implicates no constitutionally protected right."]. Moreover, in *Lawton v. Steele, supra*, the Court held that destruction of "public nuisances," such as gambling instrumentalities, may be accomplished, consistent with Due Process, by "summary" proceedings. And, in *Calero-Toledo v. Pearson Yacht Leasing Co., supra*, no preseizure proceeding was required for the forfeiture of contraband.

Further, the Court has also reviewed a federal statute similar to South Carolina's and rejected the claim that the language therein – "involved an element of chance" – is void for vagueness. *United States v. Korpan*, 354 U.S. 271 (1957).

Accordingly, the constitutional claims in this case have long been decided by this Court, thus furthering the necessity for *Burford* abstention here. The federal interest in this case is clearly "minimal."

renders Respondents federal claims and the need for having the matter decided by a federal court as "minimal." Undoubtedly, "lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks v. Miranda*, 422 U.S., *supra* at 334. Accordingly, the District Court's decision to abstain should have been affirmed.[9]

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[9] While *Burford* was not raised in *Holliday*, – a case decided in 1948 long before *Burford* was fully established – it is easy to see from *Holliday* how a federal court will inevitably become "enmeshed" or "entangled in a skein of state law." *NOPSI*, *supra*. In *Holliday*, the three-judge court first had to determine whether in-line pin games were "game of chance" under South Carolina law before it could address Holliday's constitutional claims against South Carolina's forfeiture statutes. Today, even more so, – where legality is adjudged on a "machine-by-machine" basis – it is clear that a federal court will necessarily become entangled in the intricacies of state law. As in *Holliday*, the federal court will be required to insert itself into South Carolina gambling law before it can proceed to decide the federal issues before it. Judge Wilkinson, in his dissent discusses this entanglement at considerable length. See, *Pet. App.* a36-a50.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 13, 2008.

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Supreme Court, U.S.
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In the Supreme Court of the United States

Robert Stewart, as Chief of the South Carolina Law Enforcement Division; Henry McMaster, as Attorney General of the State of South Carolina; and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Petitioners,

v.

Jimmy Martin and Lucky Strike LLC,
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Jimmy MARTIN; Lucky Strike LLC,
Plaintiffs-Appellants,

v.

Robert STEWART, as Chief of the South Carolina Law Enforcement Division; Henry McMaster, as Attorney General of the State of South Carolina; Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants-Appellees.

No. 06-1829.

Argued: May 24, 2007.
Decided: Aug. 29, 2007.

ARGUED: James Mixon Griffin, Columbia, South Carolina, for Appellants. Clyde Havird Jones, Jr., Senior Assistant Attorney General, Office of the Attorney General Of South Carolina, Columbia, South Carolina, for Appellees. **ON BRIEF:** Richard A. Harpootlian, Columbia, South Carolina, for Appellants. Henry Dargan McMaster, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Robert D. Cook, Assistant Deputy Attorney General, Office Of The Attorney General Of South Carolina, Columbia, South Carolina, for Appellees.

Before WILKINSON, MOTZ, and TRAXLER, Circuit Judges.
Reversed and remanded by published opinion. Judge MOTZ wrote the majority opinion, in which Judge TRAXLER joined. Judge WILKINSON wrote a dissenting opinion.

DIANA GRIBBON MOTZ, Circuit Judge:
In this case, the district court dismissed federal constitutional challenges to two South Carolina statutes regulating video poker, on the ground that *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), mandated abstention. Because resolution of these challenges neither requires a court to adjudicate difficult questions of state law, nor disrupts state efforts to establish through a complex regulatory process a coherent policy on a matter of substantial public concern, this case falls well outside the narrow category of cases to which *Burford* abstention may apply. Accordingly, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

The parties do not dispute the material facts. Jimmy Martin and Lucky Strike, LLC (collectively Martin), brought this action against three South Carolina officials in their official capacities: Robert Stewart, Chief of the State Law Enforcement Division; Henry McMaster, Attorney General; and Ralph Hoisington,

Solicitor of the Ninth Judicial Circuit (collectively the State). Martin sought to enjoin enforcement of two South Carolina statutes criminalizing certain "device[s] pertaining to games of chance." S.C.Code Ann. § § 12-21-2710 & -2712 (2006). Like all statutes regulating "gambling enterprises," such legislation lies well within "the state's police power." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir.1999). Martin does not contend to the contrary, nor does he assert that the South Carolina statutes violate any *state* law or policy. Rather, Martin maintains that the challenged statutes violate the Constitution of the United States.

The South Carolina legislature enacted the provisions at issue in a 1999 amendment to South Carolina's gambling laws. *See* 1999 S.C. Acts 1319-23. The first provision, section 12-21-2710,[1] makes it unlawful for a

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[1] Section 12-21-2710 provides in full:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine,

person to "keep on his premises or operate" certain gaming machines, including "device [s] pertaining to games of chance." S.C.Code Ann. § 12-21-2710. A violation of this statute constitutes a misdemeanor, punishable by a fine not to exceed $500, imprisonment for no more than a year, or both. *Id.*

The second challenged provision, section 12-21-2712, directs law enforcement officers to seize machines prohibited by section 12-21-2710 and bring them before a county magistrate. S.C.Code Ann. § 12-21-2712. The magistrate must determine whether the machine violates any law and, if it does, order its destruction. *Id.*[2] South Carolina law entitles a machine owner to

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but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

S.C.Code Ann. § 12-21-2710 (2006).

[2] Section 2712 reads in full:

Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C.Code Ann. § 12-21-2712 (2006).

a post-seizure hearing before a magistrate to determine the machine's legality and to an appeal of that decision to higher courts. *See Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 621 S.E.2d 344, 351 (2005). No pre-enforcement mechanism exists for testing a particular machine's legality.

Martin filed this action in federal court in the District of South Carolina, asserting that sections 12-21-2710 and 12-21-2712 violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Although the district court had federal question jurisdiction to consider these constitutional claims, *see* 28 U.S.C. § 1331 (2000), the State moved to dismiss. Believing the *Burford* doctrine required abstention, the district court granted the motion. *Martin v. Stewart*, 438 F.Supp.2d 603, 608-09 (D.S.C.2006). Martin noted a timely appeal and we have jurisdiction to consider this appeal under 28 U.S.C. § 1291 (2000).

We review a district court's decision to abstain under *Burford* for abuse of discretion. *Harper v. Pub. Serv. Comm'n*, 396 F.3d 348, 357-58 (4th Cir.2005). A district court abuses its discretion whenever "its decision is guided by erroneous legal principles." *United States v. Under Seal (In re Grand Jury)*, 478 F.3d 581, 584 (4th Cir.2007) (internal quotation marks omitted); *see also Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Consequently, "there is little or no discretion to abstain in a case which does not meet

traditional abstention requirements." *Dittmer v. County of Suffolk,* 146 F.3d 113, 116 (2d Cir.1998) (internal quotation marks omitted).

II.

The Supreme Court has repeatedly instructed that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996); *see, e.g., Deakins v. Monaghan,* 484 U.S. 193, 203, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988) ("[T]he federal courts have a virtually unflagging obligation to exercise their jurisdiction ...." (internal quotation marks omitted)); *England v. La. State Bd. of Med. Exam'rs,* 375 U.S. 411, 415, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) (" 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.' " (quoting *Willcox v. Consol. Gas Co.,* 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909))); *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821) ("[The Supreme Court] ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

Abstention doctrines constitute "extraordinary and narrow exception[s]" to a federal court's duty to exercise the jurisdiction conferred on it. *Quackenbush,* 517 U.S. at 716, 728, 116 S.Ct. 1712 (internal quotation marks omitted). These exceptions require the denial of discretionary relief when "principles of

federalism and comity" outweigh the federal interest in deciding a case. *See id.* at 716, 728, 116 S.Ct. 1712. To cabin that discretion and ensure that abstention "remains the exception, not the rule," the Supreme Court has "carefully defined ... the areas in which such abstention is permissible." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 359, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989)(*NOPSI*) (internal quotation marks omitted).

For example, *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), permits federal courts to abstain from hearing cases that would interfere with a pending state criminal proceeding. Pursuant to *Railroad Commission v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), courts may abstain when the need to decide a federal constitutional question might be avoided if state courts are given the opportunity to construe ambiguous state law. Another doctrine, articulated in *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), allows abstention in cases raising issues "intimately involved with [the State's] sovereign prerogative," where proper adjudication might be impaired by unsettled questions of state law. And in *Burford,* the Court recognized that courts may abstain when the availability of an alternative, federal forum threatened to frustrate the purpose of a state's complex administrative system. *Burford,* 319 U.S. at 331-32, 63 S.Ct. 1098; *see also Quackenbush,* 517 U.S. at 725, 116 S.Ct. 1712; *Ala. Pub. Serv. Comm'n v. S. Ry. Co.,* 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951).

To be sure, these discrete abstention doctrines "are not rigid pigeonholes into which federal courts must try to fit cases." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n. 9, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). Overlapping rationales motivate these doctrines and considerations that support abstaining under one will often support abstaining under another. *Id.* But at the same time, the Supreme Court has *never* allowed abstention to be a license for free-form *ad hoc* judicial balancing of the totality of state and federal interests in a case. The Court has instead defined specific doctrines that apply in particular classes of cases. *See NOPSI,* 491 U.S. at 359, 109 S.Ct. 2506. In this case, the district court relied solely on *Burford* abstention.[3]

The *Burford* doctrine "justif[ies] the dismissal of a federal action" in a "narrow range of circumstances." *Quackenbush,* 517 U.S. at 726, 116 S.Ct. 1712. *Burford* permits abstention when federal adjudication would "unduly intrude" upon "complex state administrative processes" because either: (1) "there

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[3] The State also moved to abstain on the basis of *Younger,* 401 U.S. 37, 91 S.Ct. 746. The district court did not reach this contention and so, although *Younger* abstention would seem not to apply here, we do not reach the issue either. Moreover, the State has expressly conceded the inapplicability of *Pullman* abstention. *See* Defs.' Reply Br. Supp. Mot. Dismiss 11 ("We are not arguing abstention under [*Pullman,*] which authorizes a federal court to abstain when construction of a state statute may alleviate a constitutional concern. No construction of the State's forfeiture of gambling devices statutes is necessary....").

are difficult questions of state law ... whose importance transcends the result in the case then at bar"; or (2) federal review would disrupt "state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361-63, 109 S.Ct. 2506 (internal quotation marks omitted).

Moreover, the Supreme Court has directed that "*Burford* allows a federal court to dismiss a case only" when presented with these "extraordinary circumstances." *Quackenbush*, 517 U.S. at 726-27, 116 S.Ct. 1712. Courts must balance the state and federal interests to determine whether the importance of difficult state law questions or the state interest in uniform regulation *outweighs* the federal interest in adjudicating the case at bar. *NOPSI*, 491 U.S. at 362, 109 S.Ct. 2506. "This balance only rarely favors abstention." *Quackenbush*, 517 U.S. at 728, 116 S.Ct. 1712.

The Supreme Court has consistently refused to abstain under *Burford* when neither of these criteria were met. *See, e.g., NOPSI*, 491 U.S. at 361-62, 109 S.Ct. 2506 (holding district court abused its discretion in abstaining when no "state-law claim" is involved and adjudication of preemption claim "would not disrupt the State's attempt to ensure uniformity"); *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 815, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (holding district court abused its discretion in abstaining under *Burford* when "state law to be applied appear[ed] to be settled" and federal adjudication would not "impair efforts to implement state policy"); *McNeese v. Bd. of*

Educ., 373 U.S. 668, 674, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963) (declining to abstain when "no underlying issue of state law control[s]" and "[t]he right alleged is ... plainly federal in origin and nature").

We too have limited *Burford* abstention to cases in which these criteria were met. *Compare First Penn-Pacific Life Ins. Co. v. Evans*, 304 F.3d 345, 350 (4th Cir.2002) (holding abstention proper when federal adjudication would interfere with state receivership proceedings and "disrupt[ ] the state's efforts to provide a unified method" for liquidation of debtor's assets) (internal quotation marks omitted), *and Collins*, 199 F.3d at 720, 723-24 (holding abstention proper when federal adjudication would require federal court to "answer disputed questions of state gaming law that ... powerfully impact the welfare of [state] citizens" and requested relief would "effectively establish[ ] parallel federal and state oversight of the [state] video poker industry"), *with Harper*, 396 F.3d at 358 (holding district court abused its discretion in abstaining when case "involves [the] vital *federal* question" of whether state law is constitutional and "federal jurisdiction [would not] impede the formation of core state policies"), *Gross v. Weingarten*, 217 F.3d 208, 224 (4th Cir.2000) (holding abstention improper when case involved no "difficult questions of state law ... whose importance transcends the result in the case at bar" and federal adjudication "would not [disrupt] state efforts to establish a coherent policy") (internal quotation marks omitted), *and Neufeld v. City of Baltimore*, 964 F.2d 347, 350-51 (4th Cir.1992) (holding

district court abused its discretion in abstaining when case presented no "difficult questions of state law" and a "federal decision [would not] disrupt the efficacy of an important and coherent state policy").

In sum, a federal court may abstain under *Burford* from its "strict duty to exercise" congressionally conferred jurisdiction, *Quackenbush,* 517 U.S. at 716, 116 S.Ct. 1712, only when the importance of difficult questions of state law or the state's interest in uniform regulation outweighs the federal interest in adjudicating the case at bar. The State recognizes that these principles control the abstention inquiry here and, with them in mind, we turn to the case at hand.

III.

Martin seeks a single remedy: an injunction against the enforcement of sections 12-21-2710 and 12-21-2712. He maintains that these statutes violate his Due Process and Equal Protection rights under the Fourteenth Amendment of the United States Constitution. Specifically, Martin argues that section 12-21-2710, which provides for criminal penalties, is void for vagueness because it fails to give fair notice of forbidden conduct and allows arbitrary enforcement, thus violating the Due Process Clause. He also contends that the failure of both statutes to provide a pre-enforcement mechanism for determining the legality of an amusement device and the State's discriminatory enforcement of these statutes violates

the Equal Protection Clause.

These claims present no difficult questions of state law whose importance outweighs the federal interest in adjudicating Martin's constitutional case. Nor do these claims threaten a state interest in uniform regulation that outweighs the federal interest in adjudicating the case. Accordingly, *Burford* does not permit abstention here.

A.

The Due Process challenge to section 12-21-2710 involves no difficult question of state law because, as the State itself recognizes, and in fact argues, section 12-21-2710 is "well defined by the [Supreme Court of South Carolina's] many interpretations." Brief of Appellees at 37. *See, e.g., Sun Light Prepaid Phonecard Co. v. State,* 360 S.C. 49, 600 S.E.2d 61, 64 & n. 6 (2004) (holding that a device "pertain[s] to [a] game[ ] of chance" because it contains an "element of chance" and is not "part of a legitimate promotion" to sell a product).

Indeed, in *State v. DeAngelis,* 257 S.C. 44, 183 S.E.2d 906, 908 (1971), the state court rejected a vagueness challenge to precisely the same language-"games of chance of whatever name or kind"-that Martin targets, holding that "[a]n analysis of [the statute's] wording convinces us that a man of reasonable intelligence is given fair notice of the machines proscribed [and that] the statute cannot be used in a capricious or

discriminatory manner."[4] Thus, the state law component of a vagueness challenge-whether limiting constructions apply to the language-is settled: the State's highest court has expressly held that the statutory text is to be given its ordinary meaning. The remaining question-whether the statute's ordinary meaning is unconstitutionally vague-is a matter of federal law. Thus, because state law is now "clear and certain," *Burford* abstention is inappropriate. *County*

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[4] The dissent makes the exceedingly odd argument that the *DeAngelis* holding that the term "games of chance" must be given its ordinary meaning somehow renders the statute more difficult to interpret and that we engage in "circular" reasoning in holding to the contrary. *See post* at 377. In fact, *DeAngelis* resolves any possible difficult state law question and directs a long recognized mode of statutory construction that federal courts are well equipped to undertake. Equally unavailing is the dissent's suggestion that advances in gambling technology have lessened *DeAngelis*'s significance. *See post* at 375-78. The Supreme Court of South Carolina has specifically rejected an argument that technological changes lessen the force of its prior interpretations of gambling statutes. *See State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 525 S.E.2d 872, 878-79 (2000) ("Although slot machines have changed since the 1960s, the substance of [section 12-21-2710] has not. The relevant portions of the current version outlaw the same conduct as its predecessor."). That the South Carolina legislature has revised its gambling statutes without further defining "games of chance," provides additional support for finding *DeAngelis* continues to be authoritative. *Id.* at 879 ("The legislature is presumed to be aware of [the South Carolina Supreme] Court's interpretation of its statutes. If the General Assembly considered [the Court's interpretations] outdated, it could have changed the statute ....") (citations omitted).

of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 196, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959); *see also Colo. River*, 424 U.S. at 815, 96 S.Ct. 1236 (holding case "does not fall within" *Burford* doctrine when state law "appears to be settled").

For similar reasons, Martin's discriminatory enforcement claim presents no difficult question of state law. To prevail on that claim, Martin must demonstrate that (1) he was similarly situated to persons not prosecuted; and (2) a discriminatory purpose motivated this different treatment. *See United States v. Armstrong*, 517 U.S. 456, 465-66, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). The first inquiry requires a court to determine which video poker machines are prohibited by statute, but such an inquiry hardly involves a *difficult* state law question given that *DeAngelis* held that "a [person] of reasonable intelligence is given fair notice of the machines proscribed." 183 S.E.2d at 908. If the district court should determine that state law enforcement treats parties similarly situated under the statute differently, the remaining question is purely federal-whether an impermissible purpose motivated this different treatment.

Finally, Martin's claim regarding the lack of a pre-enforcement mechanism for determining a machine's legality presents no state law question at all because indisputably South Carolina provides no pre-enforcement mechanism. Thus, resolving this claim involves no interpretation of any state law, but only

the determination of whether settled South Carolina law violates federal constitutional rights. Therefore, none of Martin's challenges presents difficult questions of state law, let alone difficult questions whose importance outweighs the federal interest in adjudicating Martin's claims.[5]

B.

Nor do any of Martin's claims threaten a state interest in uniform regulation. Martin launches a *facial* attack on the state statutes *as a whole*-precisely the sort of case federal courts often and expertly entertain. *See Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir.1988) (declining to abstain under *Burford* when "case is a direct challenge to the constitutionality of a state statute, a controversy federal courts are particularly suited to adjudicate"). If Martin should succeed, the district court would enjoin all enforcement of the statutes at issue; such relief could not possibly threaten their *uniform* application.[6]

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[5] Martin presses, perhaps without having pled, a claim that the lack of a preenforcement mechanism violates the Due Process Clause under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In any event, this claim neither presents a difficult question of state law (the statute indisputably lacks such a mechanism) nor threatens the State's interest in uniformity (if successful, all enforcement will be enjoined). Consequently, the district court erred by applying *Burford* abstention to this claim.

[6] The dissent frets that litigation of Martin's discriminatory enforcement claim will require "discovery [that] would put South Carolina's regulatory regime through the

Moreover, contrary to the State's suggestion, Brief of Appellees at 20, "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n. 5, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Therefore, "the threat that the federal courts might decide the entire state system unconstitutional is not a valid justification for *Burford* abstention." *Neufeld,* 964 F.2d at 351. Rather, this "sort of risk is present whenever one attacks a state law on constitutional grounds in a federal court." *Bath Mem. Hosp. v. Me. Health Care Fin. Comm'n,* 853 F.2d 1007, 1013 (1st Cir.1988).

As then-Judge Breyer explained in refusing to abstain from deciding similar constitutional challenges to several state statutes:

The plaintiffs do not seek individualized review of fact- (or cost-) specific regulatory decision making. To the contrary, they attack the statute as it is written. Permitting a federal court to decide this kind of constitutional claim would not interfere significantly

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wringer,"*post* at 379, but cites no authority for the proposition that normal discovery burdens can justify *Burford* abstention. Moreover, Martin cannot obtain any discovery on his discriminatory enforcement claim unless he makes a "credible showing" that no "legitimate prosecutorial factor" separates his operations from those not prosecuted, *United States v. Khan,* 461 F.3d 477, 498 (4th Cir.2006).

with the workings of a lawful state system, as such intervention threatened in *Burford*....

Id. at 1014.

Justice Breyer's words reflect an important distinction, which the State fails to recognize, between federal claims that rest on an alleged predicate violation of state law and those that do not. Federal claims that rest on allegations that a state agency or private actors violated state law can sometimes undermine a state's efforts to regulate uniformly-if the federal court interprets state law differently than the state enforcement agency or the state forum that would otherwise hear the dispute. When a "federal" claim rests on a violation of state law, we consider it a "state law [claim] in federal law clothing." *Collins,* 199 F.3d at 721 (internal quotation marks omitted). Because of the diminished federal interest in adjudicating such claims and the heightened threat they pose to uniform state regulation, federal courts have less interest at stake in adjudicating such claims and often abstain in such cases. *Id.; see, e.g., Burford,* 319 U.S. at 317, 63 S.Ct. 1098 (due process claim that state agency unreasonably applied state law); *Collins,* 199 F.3d at 722 (civil RICO claim dependent on violations of state law for predicate acts).

But federal claims, like those at issue here, which do not rest on finding a violation of state law, are federal not only in "clothing," but also in fact. Such claims are "plainly federal in origin and nature," are independent

of any state law violation, and do not threaten uniform state regulation. *McNeese,* 373 U.S. at 674, 83 S.Ct. 1433. The *Burford* doctrine does not permit a federal court to abstain from deciding them. *See, e.g., id.; NOPSI,* 491 U.S. at 362, 364, 109 S.Ct. 2506 (holding "*Burford* abstention is not justified" when "primary claim" is that state body violated "federal law"); *Harper,* 396 F.3d at 358 (holding that "[a]pplying *Burford* here was inappropriate" because, unlike *Collins,* 199 F.3d at 719, case "involves a vital *federal* question"-the constitutionality of a state statute); *Neufeld,* 964 F.2d at 350 (holding *Burford* did not apply to claims challenging state statute on federal constitutional grounds).

Because Martin's claims neither involve difficult questions of state law nor threaten a state interest in uniform regulation, the *Burford* doctrine does not justify abstention here.

IV.

Notwithstanding the State's agreement as to the undisputed material facts and its acknowledgment of controlling legal principles, it insists that *Burford* does require abstention in this case. The State's position rests on two fundamental errors: (1) a serious mischaracterization of Martin's claims and (2) an equally serious misreading of our opinion in *Collins.*

A.

First, the State iterates and reiterates that Martin seeks to have "classes and categories of machines declared 'legal' under South Carolina law" or to have a federal court "replace [South Carolina's forfeiture system] with a method of [Martin's] own choosing." Brief of Appellees at 3. These assertions, repeated at oral argument and at least ten times in the State's brief, *see id.* at 2, 3, 9, 10, 14, 21, 50, 53, are simply not accurate. Martin seeks only "injunctive relief prohibiting the enforcement of" two state statutes, which he claims violate the United States Constitution.

This would be a different case if Martin had, in fact, sought a federal declaration that specific machines were lawful under South Carolina law or a federal injunction seeking replacement of the State's forfeiture mechanism with one of the court's design. In such circumstances, adjudication of Martin's claims might lead a federal court to "effectively commandeer [ ] South Carolina's enforcement efforts." *Collins,* 199 F.3d at 723. But, like the plaintiffs in a case in which the Second Circuit recently reversed a district court's dismissal on *Burford* grounds, Martin does not "collateral[ly] attack ... a final determination" made by any state administrative agency "or seek to influence a state administrative proceeding." *Dittmer,* 146 F.3d at 117. Rather, like those plaintiffs, Martin presents only "a direct facial attack on the constitutionality of a state statute," the kind of "controversy federal courts are particularly suited to adjudicate." *Id.* (internal

quotation marks omitted); *see also Baran v. Port of Beaumont Navig. Dist.*, 57 F.3d 436, 442 (5th Cir.1995) (holding "facial challenge" to state statute on federal constitutional grounds does not implicate "the policy concerns of *Burford* " and so "abstention under that doctrine would be inappropriate"). In sum, Martin's actual claims, unlike the fictional ones described by the State, are not proper candidates for *Burford* abstention.

B.

Moreover, and just as significantly, the State misreads *Collins.*To be sure, in *Collins* we properly recognized that "[t]he regulation of gambling enterprises lies at the heart of the state's police power,"199 F.3d at 720, and the case at hand, like *Collins,* involves state regulation of gambling.

But we did not abstain in *Collins because* it involved the regulation of that important state interest. Abstention on that basis would be improper. Neither *Collins* nor any other case holds that *Burford* abstention is appropriate whenever federal litigation affects an important state interest. Indeed, both the Supreme Court and this court have specifically rejected the view that a strong state interest alone could justify *Burford* abstention. *See County of Allegheny,* 360 U.S. at 191-92, 79 S.Ct. 1060 (rejecting the suggestion that "abstention is justified ... any time a District Court is called on to adjudicate a case involving the State's power of eminent domain"); *Educ. Servs., Inc. v. Md.*

State Bd. for Higher Educ., 710 F.2d 170, 173 (4th Cir. 1983) (acknowledging "the important and sensitive nature of state educational regulation," but holding "*Burford* abstention rests on additional concerns beyond the mere presence of an important state administrative regime, concerns not present here"); *see also Hachamovitch v. De Buono*, 159 F.3d 687, 698 (2d Cir. 1998) (noting "numerous cases have indicated that *Burford* abstention is not required even in cases where the state has a substantial interest if the state's regulations violate the federal constitution").

Instead, we abstained in *Collins* because we concluded that the criteria for *Burford* abstention were met. That is, (1) federal adjudication there would require a federal court to "answer disputed questions of state gaming law that ... powerfully impact the welfare of [state] citizens" and (2) the relief sought would "effectively establish[ ] parallel federal and state oversight of the [state] video poker industry." *Collins*, 199 F.3d at 720, 723-24.[7]

In contrast, federal adjudication in this case would not require a federal court to "answer disputed questions

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[7]We concluded that the district court order reviewed in *Collins* "effectively commandeered [the State's] enforcement efforts" by "impos[ing] on [the defendant video poker operators] an extensive set of requirements." *Id.* at 718, 723. We noted as an example that "the district court mandated that defendants post a designated 'clarifying sign' on each video poker machine" and required detailed record keeping. *Id.* at 718.

of state law," nor would the relief sought establish "parallel federal and state oversight." Although the statutes challenged here regulate gambling, unlike *Collins*, issues of federal law-the constitutionality of those statutes under the Fourteenth Amendment-dominate this action. As we recognized in *Harper*, 396 F.3d at 358, *Burford* abstention is "inappropriate" in such a situation. In *Harper* we contrasted *Collins*, in which "issues of state law ... dominated," with a case involving precisely the same kind of "vital *federal* question" as that at issue here-a challenge to the constitutionality of a state statute. *Id.* (internal quotation marks omitted). We concluded that the district court had abused its discretion in abstaining in such a case. *Id.* So it is here.

Contrary to the State's apparent belief, *Collins* did not create a "video-poker abstention" doctrine that forever insulates South Carolina statutes regulating gambling from federal constitutional challenge. The district court abused its discretion in abstaining here under *Burford* because adjudication of Martin's claims, unlike the claims advanced in *Collins*, neither presents difficult questions of state law whose importance transcends the case at bar, nor threatens the State's interest in uniform regulation.

V.

Although the dissent concedes that "abstention must be carefully cabined," *post* at 381, and takes no issue with our statement of the *Burford* doctrine, it would hold

that the district court properly abstained here. It relies on factors totally irrelevant to the "extraordinary and narrow" *Burford* doctrine, *e.g.*, the absence of a federal gambling statute, the effect of the Fourteenth Amendment and 42 U.S.C. § 1983 (2000) on federal-state relations, the history of gambling regulation, the burdens of discovery, and the alleged federalization of gambling policy. The dissent fails to apply the actual *Burford* doctrine because it cannot-if it did so it would have to hold that the district court abused its discretion in abstaining here.

The dissent's analysis appears to be motivated by its preference that cases like Martin's be brought in state court. *See, e.g., post* at 372 ("I see no indication in this case that the South Carolina state courts have defaulted in any fashion on their obligation to entertain federal constitutional challenges to the operation of state gambling laws."); *id.* at 380 ("[T]he sky will not fall whenever state courts resolve a federal question."). Although we share the dissent's respect for our state colleagues, " '[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' "*England*, 375 U.S. at 415, 84 S.Ct. 461 (quoting *Willcox*, 212 U.S. at 40, 29 S.Ct. 192) (omission in original). Martin chose to file his claims in a federal forum created by Congress-we cannot deny him that choice even if we disagree with it.

Because Martin's claims do not meet the "extraordinary and narrow" criteria for *Burford* abstention, the judgment of the district court is

REVERSED AND REMANDED.

WILKINSON, Circuit Judge, dissenting:
There are few decisions more central to state authority than whether to allow legalized gambling, how extensively, and under what terms. Plaintiffs' lawsuit calls for both the interpretation of state law at the heart of the state's regulatory scheme and an extensive inquiry into the state's enforcement practices. While plaintiffs may certainly challenge South Carolina's exercise of its police powers as unconstitutional, the district court was within its authority to conclude that plaintiffs' constitutional challenge would be most properly heard in state court.

Congress has given no indication that it wishes to sweep most federal challenges to state gambling policy into federal court. I do not believe that the general grant of federal concurrent jurisdiction in 42 U.S.C. § 1983 manifests any congressional intention to abrogate the discretion of federal district courts to defer under *Burford* to the complex state administrative and judicial mechanisms involved in regulating gambling enterprises.

And it is not only congressional intent that I believe has been offended. In holding that the district court abused its discretion by abstaining, the majority

diminishes the capacity of trial courts to perform the judicious balancing that lies at the heart of any exercise of equitable discretion. The majority also disrespects the role of state courts: while we properly defer to federal administrative agencies under *Chevron* Step Two, somehow the federal courts are now to be prohibited from showing even a lessened deference to state administrative and judicial systems operating in their own areas of expertise. Further, because federal courts will make an understandable effort to avoid inconsistency and interference with the states, the majority approach will also in time shortchange litigants. Finally, the majority diminishes the values of our federal system, which can hardly be served in this most traditional area of state competence by having the federal appellate courts call the shots. I am at a loss to understand what aims of law are furthered when the federal circuit courts undercut the legitimate institutional interests of so many other actors within our legal system.

This dispute is not confined simply to the case at hand. It touches on the basic application of abstention principles to state regulatory regimes in the most sensitive areas of state sovereignty-an issue that has been rife with conflicting approaches. "[L]ower courts continue to disagree as to when [*Burford*] abstention is appropriate." Erwin Chemerinsky, *Federal Jurisdiction* § 12.2, at 784-85 & nn. 108-09 (4th ed.2004). "Confusion over the scope of *Burford* abounds...." Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford*

to Ankenbrandt, 42 DePaul L.Rev. 859, 866 (1993).

In the gambling context, specifically, similar confusion reigns, with some courts refusing to abstain, and others deciding abstention is appropriate when a federal court is confronted with challenges to state gambling laws. *Compare Hotel & Rest. Employees & Bartenders Int'l Union Local 54 v. Danziger*, 709 F.2d 815 (3d Cir.1983), *judgment vacated on other grounds by Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 104 S.Ct. 3179, 82 L.Ed.2d 373 (1984) (refusing to apply *Burford* abstention to challenges to portions of state gambling scheme); *Turf Paradise, Inc. v. Ariz. Downs*, 670 F.2d 813 (9th Cir.1982) (same) *with Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir.1999) (abstaining under *Burford* from deciding challenges to state gambling regime); *G2, Inc. v. Midwest Gaming, Inc.*, 485 F.Supp.2d 757 (W.D.Tex.2007) (same); *Metro Riverboat Assocs., Inc. v. Bally's Louisiana, Inc.*, 142 F.Supp.2d 765 (E.D.La.2001) (same); *Diamond Game Enter. v. Howland*, 1999 WL 397743 (D.Or.1999) (same). While factual differences no doubt exist between these cases, there is a basic divide between those who believe *Burford* abstention has some modest utility in the face of constitutional challenges to state regulatory regimes and those who do not.[1]

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[1]Lower courts have also abstained from deciding cases involving state gambling schemes under other abstention doctrines. *See Taylor v. Siegelman*, 230 F.Supp.2d 1284 (N.D.Ala.2002) (abstaining from plaintiffs' challenge to state

I see no indication in this case that the South Carolina state courts have defaulted in any fashion on their obligation to entertain federal constitutional challenges to the operation of state gambling laws. I see no way in this case to avoid the interpretation of difficult questions of state law and interference with state regulatory policies. I see no sign in this case that interpretation of the terms of any federal statute involving gambling is at issue or that Congress has done anything to remove the choice among different approaches to gambling regulation from its historic venue in the states.

Given the absence of any specific manifestation of congressional jurisdictional intent in the area of gambling, I remain unconvinced that the general expression of federal jurisdictional authority pursuant to § 1983 is enough to divest district courts of their discretion to accord respect to state regulatory choices regarding gaming policy and state court review of those choices. While I recognize that the Fourteenth Amendment and § 1983 re-ordered federal and state

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gambling statute under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971)); *Club Ass'n of W.Va., Inc. v. Wise*, 156 F.Supp.2d 599 (S.D.W.Va.2001) (abstaining from a challenge to state gambling statutes under *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)); *Chun v. State of New York*, 807 F.Supp. 288 (S.D.N.Y.1992) (abstaining from a challenge to state gambling scheme under both *Pullman* and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)).

relationships (including the relationships between federal and state courts) in the most fundamental way, I do not think it re-ordered these relationships to such an extent as to render *Burford* abstention virtually inapplicable to all constitutional challenges in federal court to specialized state regulatory regimes. I see nothing to justify the majority's holding that no reasonable district court could, in these circumstances, stay its hand.

I.

Federal courts have reason to tread cautiously in addressing a state's regulation of gambling, because such schemes of regulation lie at "the heart of the state's police power." *Collins,* 199 F.3d at 720. In fact, few activities have been so consistently treated as being at the core of state sovereignty. *Id.* South Carolina, in particular, has long exercised its police power in this area, developing over time a complex and comprehensive system to regulate gambling activity.

A.

The Supreme Court has treated the regulation of gambling as a quintessential state function for more than a century. *See United States v. Edge Broad. Co.,* 509 U.S. 418, 426, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 341, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986); *Marvin v. Trout,* 199 U.S. 212,

224, 26 S.Ct. 31, 50 L.Ed. 157 (1905). Our circuit has recognized police power authority in this area time and again. *See, e.g., Helton v. Hunt,* 330 F.3d 242, 246 (4th Cir.2003); *Casino Ventures v. Stewart,* 183 F.3d 307, 310 (4th Cir.1999). The authority of the states as to gambling is a matter of broad consensus among our sister circuits. *See Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.,* 399 F.3d 1276, 1278 (11th Cir.2005) ("The regulation of gambling lies at 'the heart of the state's police power.' ") (quoting *Collins,* 199 F.3d at 720); *United States v. Washington,* 879 F.2d 1400, 1401 (6th Cir.1989) ("The enactment of gambling laws is clearly a proper exercise of the state's police power in an effort to promote the public welfare."); *Medina v. Rudman,* 545 F.2d 244, 251 (1st Cir.1976) (same); *Boynton v. Ellis,* 57 F.2d 665, 666 (10th Cir.1932) (same).

State control over gambling has also been reinforced by Congress. While federal interests may sometimes be affected by gambling-as, for instance, when casinos are established on Indian reservations or in United States waters-Congress has generally "sought to extend, not curb, state police power in this field." *Casino Ventures,* 183 F.3d at 311.

In exercising their police power, states may reasonably conclude that gambling brings an "increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Posadas,* 478 U.S. at 341, 106 S.Ct. 2968. They may also conclude that gambling fosters addiction and

exploits human weakness, drawing down the assets of those who can least afford to gamble money away. *See Collins,* 199 F.3d at 720; *Posadas,* 478 U.S. at 341, 106 S.Ct. 2968.

At the same time, states often invoke the police power to control gambling rather than prohibit it. States may well conclude that permitting gambling enhances public welfare by allowing citizens free choice in their recreational pursuits and by spurring economic growth through gambling-related business enterprises. In addition, gambling can generate tax revenue that may fund schools, public works, and other government programs. *See Collins,* 199 F.3d at 720. States may also conclude that legalized gambling is a lesser evil, believing the activity's harms can best be harnessed when the activity is subject to regulation and kept in plain view.

The diversity of views towards gambling has given rise to schemes of regulation that are nearly as varied as the states establishing them. Several states-Utah and Hawaii, for example-forbid commercial gambling altogether. *See* Utah Const. Art. VI, § 27; Hawaii Rev. Stat. § 712-1223 (2006). Many others-more than two-thirds, as of 1999-allow government-controlled gambling in the form of lotteries. *National Gambling Impact Study Commission Final Report* ("*NGISC Report* ") (1999), *available at* http:// govinfo. library. unt. edu/ ngisc/ reports/ fullrpt. html, Page 2-1 (last visited July 19, 2007). Some states, such as Nevada, New Jersey, and Mississippi, have gone further,

permitting privately run gambling within their borders. And there are variations even among these. Nevada, for instance, allows slot machines virtually anywhere, including at airports and supermarkets. On the other hand, Mississippi and New Jersey concentrate legalized gambling in limited areas, the former restricting gambling to coastal counties and riverboats, and the latter restricting gambling to Atlantic City alone. *NGISC Report* 2-4; 2-7; 3-5. Regardless of the particular scheme, states that allow legalized gambling impose a unique mix of controls on gambling venues, including licensing requirements, number, size, and type of site standards, and advertising limitations.

I would be hard-pressed to identify any field of regulation about which there is broader or deeper consensus on the appropriateness of state control.

B.

For decades, the South Carolina General Assembly has sought to balance "the revenue gained from licensing and taxation of [gambling] against the social costs of gambling addiction." *Collins,* 199 F.3d at 716. In doing so, the General Assembly has tried a number of plans to determine the appropriate level of gambling control, and has developed numerous mechanisms to enforce its regulations. The South Carolina General Assembly initially banned all gambling, with the exception of "coin operated nonpayout machines with

a free play feature" as long as the machines did not disburse "money or property" to a player. S.C.Code Ann. § 16-19-60 (Law.Co-op.1976) (amended to delete the word "property," *see* Act effective June 18, 1986, Part II, § 26(B), S.C. Acts 540). The state later experimented with legalized electronic gambling from 1982 to 2000, exempting "video games with a free play feature" from prohibition. 1982 S.C. Act No. 466.[2] And in *State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660, 661-62 (1991), the South Carolina Supreme Court held that nonmachine cash payouts from these video gaming machines were legal under S.C.Code Ann. § 16-19-60 (Supp.1999).

Such machines are now once again forbidden by South Carolina law. It is presently "unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State" certain gambling devices. The devices prohibited include "any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps" as well as "any punch board, pull board, or other device pertaining to games of chance of

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[2] Codified as S.C.Code Ann. § 52-15-10 and subsequently recodified as § 12-21-2710. In 1997, this section was amended to limit the exemption to those video games "which meet the technical requirements provided for in Section 12-21-2782 and Section 12-21-2783." 1997 S.C. Act No. 155, Pt. II, § 54(B).

whatever name or kind...." S.C.Code Ann. § 12-21-2710 (2006).

South Carolina has long employed a multitiered regulatory structure-comprised of legislative, executive, administrative, and judicial mechanisms-to enforce its gambling laws. Currently, no fewer than five different state entities are part of this effort. First, State Law Enforcement Division (SLED) officers have the authority to enforce South Carolina's gaming statutes. *See* S.C.Code Ann. § 23-3-15 (2006). According to plaintiffs, at least one SLED officer has received specialized training on whether a particular video game machine qualifies as a "game of chance."

Second, the South Carolina Attorney General issues opinion letters that construe the statutory scheme and provide guidance to SLED officers. *See, e.g.*, Letter from Attorney General Charles M. Condon to South Carolina Law Enforcement Division Chief Robert M. Stewart (May 8, 2000), *available at* www. sctax. org/ Publications/ vg/ opn 5800. pdf (last visited July 19, 2007).

Third, after SLED officers seize machines they consider to be in violation of state law, the devices are brought before state magistrates. These magistrates, who have expertise in the particulars of South Carolina's gaming laws, "immediately examine" each machine and make a determination of their legality as the machines are configured at that time. *See*S.C.Code Ann. § 12-21-2712 (2006); *Allendale County Sheriff's*

Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004). These magistrates provide specialized review of the machines, determining whether they constitute an illegal "game of chance" under § 12-21-2710, the very provision a federal court would need to interpret to evaluate plaintiffs' claims.

Further, the magistrates serve to place "some restraint" upon law enforcement officers "who represent the executive authority of the state...." *State v. Kizer,* 164 S.C. 383, 162 S.E. 444, 449 (1932), *overruled on other grounds by State v. 192 Coin-Operated Video Game Machs.,* 338 S.C. 176, 525 S.E.2d 872 (2000).

Fourth, a machine owner may appeal a magistrate's decision through the state court system, which has heard scores of cases defining the contours of the state's gambling laws. *See, e.g., 192 Coin-Operated Video Game Machs.,* 338 S.C. 176, 525 S.E.2d 872; *Westside Quik Shop Inc. v. Stewart,* 341 S.C. 297, 534 S.E.2d 270 (2000), *overruled in part by Byrd v. City of Hartsville,* 365 S.C. 650, 620 S.E.2d 76 (2005); *Joytime Distribs. & Amusement Co. v. South Carolina,* 338 S.C. 634, 528 S.E.2d 647 (1999); *Johnson v. Collins Entm't Co.,* 333 S.C. 96, 508 S.E.2d 575 (1998); *Martin v. Condon,* 324 S.C. 183, 478 S.E.2d 272 (1996); *Blackmon,* 304 S.C. 270, 403 S.E.2d 660.

Fifth, the South Carolina Department of Revenue issues biannual licenses to owners of video game machines that remain legal. *See*S.C.Code Ann. § 12-21-2720 (2006) (allowing video machines, with a

license, for the playing of music, kiddy rides, "machines for the playing of amusements or video games, without a free play feature, or machines of the crane type operated by a slot ... and a machine for the playing of games or amusements, which has a free play feature, operated by a slot ... and the machine is of the nonpayout pin table type with levers or 'flippers' operated by the player in which the course of the balls may be altered or changed...."). In sum, South Carolina has established a specialized scheme to interpret and enforce laws that lie at the center of state sovereignty.

II.

As the district court recognized, abstention was warranted here because plaintiffs' lawsuit threatens to trammel South Carolina's highly reticulated regulatory regime. Plaintiffs raise three claims. First, they assert that § 12-21-2710's prohibition against possessing any "device pertaining to games of chance of whatever name or kind" is void for vagueness. Second, plaintiffs challenge South Carolina's gambling scheme on equal protection grounds, asserting that they are "being subjected to discriminatory enforcement of the laws pertaining to video game machines...." *Brief of Appellants* at 5. Finally, plaintiffs challenge the post-seizure procedure by which South Carolina determines the legality or illegality of a particular video gaming device. The district court was entitled to abstain from deciding these claims, for reasons I shall discuss in turn.

A.

Plaintiffs first claim that the provision forbidding "devices pertaining to games of chance of whatever name or kind" is void for vagueness on the theory that "its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Specifically, plaintiffs contend that this provision could be read to outlaw Monopoly, simple card games, and personal computer and cell phone games such as minesweeper and solitaire. *See Brief of Appellants* at 5. While I emphatically do not embrace the proposition that every vagueness challenge to a state statute in federal court warrants abstention, neither do I subscribe to the view that every unclear question of state law forecloses abstention in favor of a federal vagueness challenge. Contrary to the majority's contention that plaintiffs' challenge "involves no difficult question of state law,"*ante* at 366, plaintiffs' claim that "games of chance" is "not clearly defined" is certainly plausible enough that the district court's decision to abstain cannot be considered an abuse of discretion. Indeed, federal court involvement here will interfere with the detailed, individualized analysis required to determine what constitutes a "game of chance" and will inescapably intrude upon South Carolina's regulatory system.

In this case, in order to evaluate plaintiffs' vagueness

challenge, the federal court would have to define "games of chance," a task it cannot complete without delving into the "meaning, interpretations, and the general regulatory context" of § 12-21-2710. *Martin v. Stewart,* 438 F.Supp.2d 603, 607 (D.S.C.2006). The meaning and precise application in any given case of "games of chance" lie at the core of South Carolina's regulation of gaming; interpreting this provision would therefore enmesh the federal court in a question of state law that bears not simply on a "policy problem[ ] of substantial public import," *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans* ("NOPSI"), 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), but arguably on "the most hotly contested issue in South Carolina in recent years." *Collins,* 199 F.3d at 715.

The majority's conclusion that no "difficult question of state law" is presented here is astounding, insofar as its basis is the South Carolina Supreme Court's 1971 holding that "a man of reasonable intelligence is given fair notice of the machines proscribed" by the provision. *Ante* at 367 (citing *State v. DeAngelis,* 257 S.C. 44, 183 S.E.2d 906, 908 (1971)). While the majority says that the statutory text is "clear and certain" because it is given its "ordinary meaning," *ante* at 366, that circular formulation begs the question of what its ordinary meaning even is. Further, such highly generalized formulations of the provision's meaning elide every difficult question the state courts must face when interpreting and applying § 12-21-2710. Far from being "clear and certain," the provision outlawing

"games of chance" is one that South Carolina state courts must apply, on a machine-by-machine basis, to a complex and ever-changing cadre of gambling technology. Indeed, the development of video gaming machine technology and of the state courts' application of § 12-21-2710 to that technology demonstrate that the meaning and treatment of "games of chance" present "difficult questions of state law" from which the district court legitimately abstained.

For starters, not even primitive versions of the video gaming machines involved in this case were in existence at the time of *DeAngelis*. Such machines did not become commercially viable until the mid- to late-1970s, when it first became economical to combine a television-like monitor with a central processing unit. In fact, it was not until Si Redd's Coin Machines (SIRCOMA) introduced *Draw Poker* in 1979 that such devices gained any measure of popularity. *See* Ireck Galecki, "Video Poker History," Dec. 6, 2006, *available at* http:// onlinecasino press. co. uk/ video- poker- history. html (last visited July 19, 2007); *see also* "History of Video Slot Machines," *available at* http:// www. videoslot machines. com/ history. htm (last visited July 19, 2007); "History of Video Poker," *available at* http:// www. videopoker 247. com/ history. html (last visited July 19, 2007). Although the language "games of chance" can be found in the gaming statute as of 1971, S.C.Code Ann. § 5-621 (Code 1962), and the current statute, S.C.Code Ann. § 12-21-2710, the former was not part of a larger statutory provision that includes reference to any type of video gaming

device. And although the majority is correct that "slot machines have changed since the 1960s, [while] the substance of [section 12-21-2710] has not," the difficult task of distinguishing lawful from unlawful games has been complicated dramatically by these technological developments. *Ante* at 366, n. 4 (citing *192 Coin-Operated Video Game Machs.*, 525 S.E.2d at 878-79). In fact, technological developments in the thirty-six years since *DeAngelis* bear very directly on the line of demarcation between prohibited "games of chance" and permitted "games of skill." Indeed, what may have been clear to a "man of reasonable intelligence" regarding this distinction in 1971 can simply no longer be so. The legality of a particular machine must be determined on an individual basis at the time of seizure, because "video machines may be manipulated so as to change their nature from lawful to unlawful...."*Allendale County Sheriff's Office,* 606 S.E.2d at 474.

Not surprisingly, evaluations of these machines are quite detailed. For example, after a thorough examination of two Chess Challenge II game machines, the magistrate judge in *Allendale County* found the games lawful, relying in part on a detailed affidavit which explained, "the Chess Challenge II game operates in a different manner from the illegal games of chance.... Chess Challenge II operates utilizing a repeating pattern and does not utilize features that would prevent a player's skill from determining the outcome of the game. In addition, a player is able to identify the icons as they appear, and to time the

stopping of the game to increase the chance of winning." *Id.* at 472, n. 1.

And in *Sun Light Prepaid Phonecard Co., Inc. v. State,* 360 S.C. 49, 600 S.E.2d 61, 64 (2004), the South Carolina Supreme Court held that machines dispensing pre-paid, long distance telephone cards with attached game pieces constituted illegal gambling devices, because a detailed evaluation revealed that the machines (1) housed a video screen with a gambling theme; (2) played celebration music after dispensing a winning game piece; (3) froze if a pre-determined level of prize money was attained; (4) contained two meters: one which recorded the amount of money entering the machine and one (labeled "WON") which "record[ed] the value of the prizes issued by the machines"; (5) lacked a mechanism for returning change; and (6) could be linked with other machines. *Id.* at 63.

My friends in the majority, however, refuse to allow the state courts to undertake the delicate task of distinguishing between lawful and unlawful games. Because South Carolina's gaming statutes justifiably call for a machine-by-machine determination of legality, the majority's notion that it somehow can interpret "games of chance" in bulk, without disrupting South Carolina's enforcement scheme, rides roughshod over the scheme itself and the principles of federalism it purports to observe.

It is thus no simple task for the South Carolina courts

to interpret and apply § 12-21-2710, which is entrenched in a highly reticulated regulatory scheme, to a range of ever-changing, technologically advanced devices. The majority's insistence that the district court abused its discretion in abstaining, however, will complicate state tasks immeasurably. It threatens to "disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.' "*NOPSI,* 491 U.S. at 362, 109 S.Ct. 2506. *Burford* abstention exists to "protect[ ] complex state administrative processes from undue federal interference." Indeed, a case like this one, in which the federal court is called upon to resolve a "difficult question[ ] of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," provides a paradigmatic example of the circumstances justifying *Burford* abstention. *NOPSI,* 491 U.S. at 361, 109 S.Ct. 2506 (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). To say the district court abused its discretion in abstaining is beyond erroneous.

B.

Plaintiffs also mount an equal protection challenge to South Carolina's gaming laws. Plaintiffs argue that because video gaming machine owners are unable to obtain pre-enforcement review of the legality of their business pursuits like other entrepreneurs can, South Carolina makes use of "an arbitrary, capricious classification that is not rationally related to the

purposes of the statute." *Complaint* at 10, par. 38. Further, plaintiffs contend that they are "being subjected to discriminatory enforcement of the laws pertaining to video game machines ... in an effort to restrict Plaintiffs' meaningful participation in the political process in South Carolina." *Id.*, par. 39.

The majority asserts that plaintiffs merely "launch a *facial* attack on the state statutes *as a whole*," thus presenting a case federal courts "often and expertly entertain." *Ante* at 366-68. Such antiseptic treatment of plaintiffs' claim, however, exalts form over substance and gives short shrift to the essence of plaintiffs' challenge-namely that the statute is being enforced against them in a discriminatory manner. *See Complaint* at 10, par. 39. Simply describing a challenge as facial does not necessarily make it so. Instead, courts must look to the underlying import of the claim, not just to incantation of magic words and labels. Here, plaintiffs clearly desire to sift through South Carolina's entire gambling enforcement scheme, to probe all its intricate details in the name of discovery. *See Brief of Appellants* at 8-9. Rather than recognizing the claim for what it actually is, the majority accepts what it misguidedly purports to be.

By turning a blind eye to this claim's true character, the majority's approach threatens one of two possible consequences, neither of which is appealing. First, if the district court treats this as a true facial challenge, rather than what plaintiffs desire it to be-an as-applied challenge in the guise of a facial attack-plaintiffs' claim

will have been unfairly decapitated. Under a facial challenge, plaintiffs can only attack the statutory provision in the abstract, not ascertain whether it could be enforced, discriminatorily or otherwise, against particular machines-their true concern. This result leaves plaintiffs in the unenviable position of wanting to be in federal court one day, but not the next. At the same time, the majority sends the troubling message to district courts that they can skirt potential abstention problems by characterizing claims such as this as mere facial challenges. Thus, in an effort to avoid interference with state law, federal courts may construe complaints to present less serious challenges than they in fact do.

The second potential consequence stems from the majority's failure to anticipate how plaintiffs intend for this litigation to unfold. Despite the "facial" label applied to their discriminatory enforcement claim, plaintiffs' requested discovery here would put South Carolina's regulatory regime through the wringer. And as the suit moves forward, the district court will assuredly be forced to confront unsettled areas of state law-a problem that easily could have been avoided through adherence to traditional abstention principles.

Indeed, taken for what it truly is, plaintiffs' equal protection challenge inevitably requires a detailed probing of South Carolina's enforcement scheme. Thus, it was clearly not an abuse of discretion to abstain from adjudicating this claim. Plaintiffs not only ask a federal court to pass upon the rationality of

South Carolina's strategy for enforcing its gambling laws, but also seek to delve into the strategy's details. Such an undertaking would inevitably require the federal court to interpret and apply the state statute to various individualized decisions made by the state in the enforcement of its gaming laws. For example, to substantiate claims of "discriminatory enforcement," plaintiffs would question which businesses SLED and other law enforcement officers had previously investigated, how those investigations compared with the investigation of gambling enterprises, and whether any differences in enforcement methods were adequately justified. *Cf. Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir.2005) (vacating summary judgment on plaintiff's claims that she was arbitrarily singled out for punishment under the Equal Protection Clause because the district court denied discovery and plaintiff "had no opportunity to demonstrate that others situated similarly in this regard were not treated similarly").

The majority asserts that discovery burdens imposed upon states in the course of adjudicating such discriminatory enforcement claims are of no moment, asserting that normal discovery burdens cannot justify *Burford* abstention. *See ante* at 367, n. 6. To the contrary, these burdens are of moment, and the prospect of them bears legitimately upon the district court's discretion in determining whether to abstain. While discovery burdens do not of course require abstention, a trial judge may forecast that rounds of federal discovery will draw the federal court so deeply

into the mechanisms of state administrative operations that avoidance of that friction and interference is a permissible course. This at least is true in areas such as gambling policy, where the states-as a theoretical and an historic matter-may lay claim to sovereign interests.

I do not for a moment fault plaintiffs for their strategy. Rather I commend the district court for recognizing that abstention was the wise and prudent response. It is hard to imagine a greater intrusion into the processes of state government than use of the federal judicial process for a top-to-bottom review of the regulatory and enforcement measures necessary to the implementation of any gambling policy. The trial court below was justified in its conclusion that this assault upon the "rightful independence of state governments in carrying out their domestic policy" would be too much. *See Burford*, 319 U.S. at 318, 63 S.Ct. 1098 (internal quotations omitted).

C.

Plaintiffs finally claim that South Carolina's post-seizure forfeiture scheme violates due process. To say that the district court abused its discretion here is to ignore *Burford's* counsel that abstention is appropriate when federal review would "disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361-63, 109 S.Ct. 2506. The district court was entitled to leave undisturbed the considered judgment of the

South Carolina Supreme Court that the forfeiture of gaming machines pursuant to § § 12-21-2710 and 2712 accords with due process requirements. *See 192 Coin-Operated Video Game Machs.*, 525 S.E.2d. at 883.

In *192 Coin-Operated Video Game Machs.*, the South Carolina Supreme Court held that, to comport with the Due Process Clause, § 12-21-2712 must be construed to require that an owner of video gaming machines be given a post-seizure hearing prior to forfeiture of any seized devices alleged to have violated § 12-21-2710. 525 S.E.2d at 883. In so doing, the court overruled*Kizer*, 164 S.C. 383, 162 S.E. 444, to the extent it allowed for the destruction of allegedly illegal machines "without any opportunity for the owner to contest the magistrate's determination of illegality." *192 Coin-Operated Video Game Machs.*, 525 S.E.2d at 883. However, the South Carolina Supreme Court rejected the argument that § 12-21-2712 required a pre-seizure hearing, reasoning that "[t]he most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the res should not be forfeited and disposed of as provided by law.' "*Id.* (quoting *Moore v. Timmerman*, 276 S.C. 104, 276 S.E.2d 290, 293 (1981)). The South Carolina Supreme Court has repeatedly affirmed this judgment. *See, e.g., Mims Amusement Co. v. SLED*, 366 S.C. 141, 621 S.E.2d 344, 351 (S.C.2005) ("We conclude an owner's right to due process in the civil forfeiture of a video gaming machine under the state constitution and pertinent statutes is satisfied when he is given a post-seizure hearing before the magistrate,

with the right to appeal that ruling to circuit and appellate courts."); *Westside Quik Shop,* 534 S.E.2d at 273 ("We have already determined that the forfeiture of gaming machines pursuant to these statutes accords with due process requirements.").

The district court did not err in according respect to a series of well-considered state decisions in such a core area of state prerogative. Though I reiterate that abstention must be circumscribed, the sky will not fall whenever state courts resolve a federal question. *See U.S. Const. art. VI* ("This Constitution and the laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...."). They do so routinely, and the Supreme Court has encouraged them to do so in matters central to their sovereignty. In areas of traditional local control, such as land use, the Court has made clear that "[s]tate courts are fully competent to adjudicate constitutional challenges to local ... decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to [such] regulations." *San Remo Hotel v. City & County of San Francisco,* 545 U.S. 323, 347, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). To think that the inferior federal courts must pronounce the final word on every federal question embedded in state law and imbued with attributes of state sovereignty is to subscribe to misguided and ahistorical notions of federal supremacy. The district court was entitled to take into account the fact that "[p]laintiffs' federal claims are

secure in state court and are ultimately subject to review." *Martin,* 438 F.Supp.2d at 607.

While "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy," *Zablocki v. Redhail,* 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), "[t]he adequacy of state court review diminishes plaintiffs' interest in a federal forum," and when-as here-a plaintiff's claims could also be raised in state court, this "militates in favor of abstention," *Collins,* 199 F.3d at 723 (citing *Alabama Pub. Serv. Comm'n v. S. Ry. Co.,* 341 U.S. 341, 349, 71 S.Ct. 762, 95 L.Ed. 1002 (1951)). Plaintiffs' true concern is not the security of their constitutional claims in state court, but rather, the unlikelihood that the state courts will be amenable to their endeavor to replace South Carolina's current scheme with a system of their own design.

The South Carolina Supreme Court has rendered measured judgment on this issue; all federal intervention can potentially do at this stage is create a conflict with that judgment and throw South Carolina's efforts to regulate gambling into confusion. Indeed, for reasons discussed throughout, the state's interest in having its rulings preserved is uniquely strong here, as "all branches of South Carolina's government have spent considerable time and energy shaping and reviewing the statutes being challenged." *Martin,* 438 F.Supp.2d at 607. I do not suggest the district court was obligated to abstain, but neither do I think for a

moment that its decision to do so was anything close to an abuse of discretion.

III.

As to the factors the majority accuses me of thinking relevant-"the absence of a federal gambling statute, the effect of the Fourteenth Amendment and 42 U.S.C. § 1983 (2000) on federal-state relations, the history of gambling regulation, the burdens of discovery, and the alleged federalization of gambling policy,"*ante* at 370-I plead totally guilty. I do in fact rely on such things, and I do in fact believe they bear on the soundness of the exercise of federal district court discretion in the area of state gambling policy.

In one respect, I agree with the majority-that abstention must be carefully cabined. Congress controls the jurisdiction of the federal courts, and declining to exercise that jurisdiction is a decision federal judges must take only cautiously and infrequently. The abstention doctrines are not an escape for judges who cannot be bothered with hard questions. Abstention remains the distinct exception, not the general rule.

Having said that, Congress has shown no indication to displace the states' historic role in this area where no federal interest such as Indian tribal lands or United States waters is present. Congress could exercise its enumerated powers at any time to restrain the states' residual powers over gambling operations, but I cannot

find that it has manifested any such intent. To reverse the considered judgment of a trial judge in the context of a comprehensive regulatory scheme backed by the core, historic interests of the state goes much too far. It leaves our federal system a subject of lip service and not much more.

The very fact of dual systems of government and dual systems of courts creates some potential for inefficiencies and confusion. Abstention is one of those sparingly utilized means necessary to smooth the roughest edges and produce a more harmonious system. The majority does more, however, than exacerbate tensions. It authorizes lawsuits that will begin slowly to federalize-in all its aspects-questions of state gambling policy. It will do what Congress has declined to do. The majority deprives the state of a significant measure of control over issues touching not simply the pros and cons of gambling but the very tone and quality of life within state borders. This is not federalism. I respectfully dissent.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jimmy Martin and Lucky Strike LLC,
Plaintiffs,

v.

Robert Stewart, as Chief of the South Carolina Law Enforcement Division; Henry McMaster, as Attorney General of the State of South Carolina; and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants.

C/A No. 2:06-400-DCN.

June 29, 2006.

James Mixon Griffin, James M. Griffin Law Office, Richard A. Harpootlian, Richard A. Harpootlian PA, Columbia, SC, for Plaintiffs.

Clyde Havird Jones, Jr., Henry Dargan McMaster, John W. McIntosh, Robert Dewayne Cook, SC Attorney General's Office, Columbia, SC, for Defendants.

ORDER and OPINION

I. BACKGROUND

Plaintiffs Jimmy Martin ("Martin") and Lucky Strike, LLC ("Lucky Strike") assert constitutional challenges to portions of the South Carolina Video Game Machines Act, S.C. Code Ann. §§ 12-21-2710 - 2712 (2000), and request this court enjoin the statutes' enforcement. Defendants Robert Stewart, Henry McMaster and Ralph Hoisington are named in their official capacities[1] as law enforcement officers under the rubric of Ex Parte Young, 209 U.S. 123 (1908).

Martin manufactures video amusement machines in South America and seeks to design and import a machine which can be used legally under South Carolina's video gaming statutes. Lucky Strike owns and operates video amusement devices in the state. Both allege that South Carolina's statute prohibiting certain video gaming machine is void for vagueness, and that enforcement of that statute violates due process and equal protection guarantees. Defendants have filed a motion to dismiss asserting the court should abstain, or alternatively, dismiss for failure to state a claim.

South Carolina's video gaming statute provides:

> It is unlawful for any person to keep on his

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[1] Stewart is Chief of the South Carolina Law Enforcement Division ("SLED"); Henry McMaster is Attorney General of South Carolina; and Ralph Hoisington is Solicitor of the Ninth Judicial Circuit, South Carolina.

premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance. Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

S.C. Code Ann. § 12-21-2710. Enforcement of § 12-21-

2710 is provided as follows:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C. Code Ann. § 12-21-2712.[2]

According to plaintiffs, the distinction between a legal and illegal video gaming machine depends on a determination of whether the device is a "game of chance." There is no regulation defining the difference between a legal and illegal video gaming device. The

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[2] These statutes have an interesting history. In 1999 the South Carolina General Assembly amended existing law to prohibit cash payouts on video gaming machines and to ban certain video gaming machines, effective July 1, 2000, and initiated a statewide referendum to determine whether such payouts would be allowed in South Carolina (collectively, "Act 125"). If voters decided to allow video poker, the ban on payouts and the machines themselves would not take effect. A month before the referendum the South Carolina Supreme Court declared the referendum to be an unconstitutional delegation of the legislature's power. The court severed that unconstitutional provision of Act 125 and left the remaining aspects of the law in place. See Joytime Dist. v. State of South Carolina, 338 S.C. 634, 528 S.E.2d 647 (1999). The remainder of Act 125 went into effect on July 1, 2000, and is the subject of the present challenge.

only way to determine a machine's legality is for the machine to be seized and examined by a magistrate, as provided in § 12-21-2712. This process subjects the owner to possible forfeiture, destruction of the machine, and criminal prosecution.

Plaintiffs assert the definition of illegal gaming machines is so broad as to give no notice of which device may be prohibited. Under plaintiffs' interpretation, the literal prohibition of any "device pertaining to games of chance of whatever name or kind" outlaws Monopoly, card games, mine sweeper, computer solitaire, and other popular pastimes. Due to this alleged vagueness, plaintiffs contend defendants' enforcement of § 12-21-2710 is inconsistent and at times contradictory and discriminatory. Plaintiffs recount instances where a solicitor's office has determined a game to be legal, while state officials found the same device illegal, or where the Attorney General's opinions have differed with those of SLED as to the same machine. If true, this haphazard enforcement can be seen as a serious threat to plaintiffs' economic rights.

In sum, plaintiffs contend the process for determining legality improperly subjects them to forfeiture and possible criminal prosecution, in violation of Ex Parte Young. As such, plaintiffs argue the statute offends equal protection by subjecting video game/amusement operators to obstacles not encountered by other business pursuits in South Carolina. Plaintiffs also contend the statute is void for vagueness and violates due process rights as guaranteed by the Fourteenth Amendment. Plaintiffs seek preliminary and permanent injunctive relief prohibiting enforcement of

S.C. Code Ann. §§ 12-21-2710 and 12-21-2712.

II. DISCUSSION

Defendants contend that two abstention doctrines require this court to refrain from considering plaintiffs' claims.

a. Burford Abstention

Burford v. Sun Oil Co., 319 U.S. 315 (1943), generally applies to federal review of state regulatory decisions:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) ("NOPSI"). Typical Burford cases concern a plaintiff's assertion that a state agency's decision violated federal constitutional protections. See, e.g. Fort Royal and Warren County Indus. Park Corp. v. Town of Fort Royal, 945 F.2d 760 (4th Cir. 1991) (abstaining from constitutional challenge to land annexation orders).

Not all Burford abstentions involve a specific underlying state order. In Johnson v. Collins Entertainment, 199 F.3d 710 (4th Cir. 1999), plaintiffs alleged RICO claims against a variety of video poker operators. Plaintiffs' challenge did not arise from a specific state administrative or regulatory ruling. Nonetheless, the Fourth Circuit ultimately concluded abstention was warranted because the equitable relief requested intruded into "the legislative, administrative, and judicial processes of South Carolina and . . . matters of state law and regulatory policy that are best left to resolution by state bodies." Id. at 719-20.[3] Resolution of the federal claim required interpretation of state gaming law since the RICO claims "depend on alleged violation of state gaming law for their predicate acts." Id. at 722. Whether defendants violated state video gaming laws ultimately depended on interpretations of "such state statutory provisions as the payout limit and the prohibition on special inducements." Id. As such, the federal claims were "entangled in a skein of state law that must be untangled before federal rights can be adjudicated." Id. (quoting NOPSI, 491 U.S. at 361.). Resolution of the federal claim depended on the court's interpretation of

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[3] Specifically, Johnson noted that when video poker was legal, several legislative, administrative and judicial entities worked together to regulate the industry. These entities "constitute[d] an interdependent state network aimed at the comprehensive regulation of video poker." Johnson, 199 F.3d at 715. While video poker is no longer legal, all video gaming/amusement devices are subject to the statutes at bar, and the state's executive and judicial branches work together to implement this system. Law enforcement seize the machines according to their interpretations of § 12-21-2710, and magistrates review such seizures according to § 12-21-2712.

state law; i.e., whether state law allowed or prohibited an act.

Plaintiff's void for vagueness/due process claims are similarly contingent on a court's interpretation of state law. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). "A regulation is not void for vagueness unless it is so unclear with regard to what conduct is prohibited that it 'may trap the innocent by not providing fair warning,' or it is so standardless that it enables 'arbitrary and discriminatory enforcement.'" Greenville Women's Clinic v. Comm., S.C. Dep't of Health and Envtl. Control, 317 F.3d 357, 366 (4th Cir. 2002) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). In sum, the inquiry considers whether the law "fails to provide the kind of notice that will enable citizens to conform their behavior to that law." Lytle v. Doyle, 326 F.3d 463 (4th Cir. 2003).

Plaintiffs assert they ask the court to void, not to interpret. But in dissecting the void for vagueness claim, this court would have to determine what "other device pertaining to games of chance" means. The court cannot mull § 12-21-2710's clarity without delving into the statute's meaning, interpretations, and the general regulatory context. See, e.g., Greenville Women's Clinic, 317 F.3d at 367 ("we are satisfied that a reasonable person, reading the regulation in its entirety and in the context of South Carolina statutes,

would be able to interpret the regulation and determine what is required and what conduct is prohibited."). The meaning of "games of chance" is the heart of South Carolina's regulation of video gaming, and is a much more appropriate issue for a South Carolina state court to decide.

Consideration of the statute's specificity requires a degree of interpretation. A determination that the statute is clear requires interpreting state law. A conclusion that the statute is impermissibly vague similarly requires some deciphering of meaning or lack thereof. In other circumstances, this court could and should review a state law for vagueness. But the issue behind these statutes is truly sui generis. In general, gambling laws are at the core of the state's police power. In this specific context, all branches of South Carolina's government have spent considerable time and energy shaping and reviewing the statutes being challenged. The abstention analysis cannot ignore that gambling and governance of video gaming/amusement devices continue to be dominant public policy issues in South Carolina.

The court recognizes that plaintiffs raise a legitimate federal issue in whether § 12-21-2710's definition of prohibited activity is unconstitutionally vague. However, abstention requires a balance between "having federal rights adjudicated in federal court" with "state interests in the control of state regulatory programs." Johnson, 199 F.3d at 723. The state's interest is uniquely important in this circumstance. On the other hand, plaintiffs have a strong interest in airing their highly charged, politicized case in a federal forum. Nonetheless, in weighing the considerations - a

federal court interpreting the core of South Carolina's video gaming law against concern for plaintiffs' federal rights in state court - the former concern is uniquely troublesome. The state's interest outweighs any perceived state court bias against plaintiffs' video gaming interests. Plaintiffs' federal claims are secure in state court and are ultimately subject to review. The state court system - especially the South Carolina Supreme Court - is intimately familiar with the video gaming statutes and has considerable expertise construing them. As such, abstention as to plaintiffs' due process claims is proper.

For similar reasons, the court must abstain from plaintiffs' equal protection claims. Paragraph 39 of the complaint alleges plaintiffs are subject to discriminatory enforcement of §12-21-2710, among other statutes, in an effort to restrict plaintiffs' participation in the political process. Adjudication of this claim requires "untangling" the meaning of § 12-21-2710 and reviewing law enforcement application of these statutes. Numerous state agencies play a role in enforcing the video gaming statutes. Reviewing these agencies' interpretations and application of § 12-21-2710 would "arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies." Johnson, 199 F.3d at 719. As stated above, federal district court is the improper forum to parse these issues. The balance of interests again favors defendants. Therefore, the court will abstain from considering plaintiffs' equal protection claim as to discriminatory enforcement, specifically, paragraph 39.

Plaintiffs request an opportunity for discovery to bolster their assertion that defendants' enforcement of

§ 12-21-2710 is arbitrary and discriminatory. Assuming discovery revealed evidence to support plaintiffs' allegations, this court would still have to review the agencies' interpretations and consider the boundaries of reasonable definitions. In other words, anything uncovered in discovery will not change the court's balancing of the plaintiffs' interest with the state's interests so that this court can "exercise [its] discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." Johnson, 199 F.3d at 719 (quoting Burford, 319 U.S. at 318).

Plaintiffs also allege the forfeiture process violates equal protection concerns by subjecting video gaming/amusement interests to obstacles other business interests do not encounter. Specifically, plaintiffs allege they may only "obtain a determination on the legality of a proposed video amusement machine or other amusement device upon the condition that Plaintiffs subject themselves to imprisonment, fines and forfeiture of property if it is determined that the proposed video machines or other device is a '"game of chance,'" a process inconsistent with due process as outlined in Ex Parte Young. (Compl. ¶ 37.) This claim is a direct challenge to the constitutionality of the forfeiture process described in § 12-21-2712.

Section 12-21-2712 only applies to the machines identified as contraband by § 12-21-2710. To consider this equal protection challenge, the court would have to identify the persons or entities who are subject to the special classification. This inquiry would involve interpreting "other device pertaining to games of chance of whatever name or kind." Therefore, this

equal protection claim is grounded on the "games of chance" definition. For the reasons stated above, abstention is proper. Given the court's conclusion, the court need not address defendants' assertion that Younger abstention applies.

III. CONCLUSION

Abstention is the rare exception to the federal court's "unflagging" obligation to adjudicate claims within their jurisdiction. Deakins v. Monaghan, 484 U.S. 193, 202 (1988). However, the issues involved in this case are not the average policy considerations. The court's decision to abstain has no bearing on the merits of plaintiffs' constitutional claims. Plaintiffs' allegations of arbitrary and discriminatory interpretation and enforcement of these statutes raise important constitutional concerns which warrant serious judicial review. However, resolution of those claims are so intertwined with substantive state law issues as to require this court's abstention. Considering the Fourth Circuit's empathic remand in Johnson, a traditional Yiddish proverb reflects the wisdom of abstention in the video poker context: "Besser fri'er bevorent aider shpeter bevaint."[4]

For the reasons stated above, it is therefore **ORDERED** that defendants' motion to dismiss plaintiffs' claims be **GRANTED.**

AND IT IS SO ORDERED.

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[4] "Better caution at first than tears afterwards." Yiddish Wisdom 37 (1996).

/s
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

June 29, 2006
Charleston, South Carolina

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Jimmy Martin; Lucky Strike LLC,
Plaintiffs - Appellants,

v.

Robert Stewart, as Chief of the South Carolina Law Enforcement Division; Henry McMaster, as Attorney General of the State of South Carolina; Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants - Appellees.

No. 06-1829
(2:06-cv-00400-DCN)

FILED: September 20, 2007

O R D E R

Upon consideration of appellees' motion for leave to file petition for rehearing and request for rehearing en banc out of time, the Court grants the motion.

As no poll was requested on the request for rehearing en banc, the Court denies the request.

The Courts denies the petition for rehearing.

Entered at the direction of Judge Motz, with the

concurrence of Judge Traxler. Judge Wilkinson voted to grant panel rehearing.

For the Court
/s/ Patricia S. Connor
Clerk

APPENDIX IV

S.C. Code Ann. §12-21-2710

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

APPENDIX V

S.C. Code Ann. §12-21-2712

Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

APPENDIX VI

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jimmy Martin and Lucky Strike, LLC,
Plaintiffs,

v.

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants.

February 9, 2006

COMPLAINT

INTRODUCTION

1. Plaintiffs bring this action under the authority of *Ex Parte Young* 209 U.S. 123, 28 S. Ct. 441 (1908) seeking an injunction against the continued enforcement of various provisions of the South Carolina Video Game Machines Act, as amended, against Plaintiffs on the grounds that the challenged provisions violate Plaintiffs' rights to equal protection and due process as guaranteed by the United States Constitution as more fully described hereinbelow.

PARTIES

2. Plaintiff Jimmy Martin is a citizen and resident of the State of South Carolina who seeks to operate non-gaming video amusement devices in South Carolina.

3. Plaintiff Lucky Strike Games LLC is a South Carolina limited liability corporation that owns and operates video amusement devices in South Carolina, including the Counties of Charleston, Dorchester and Colleton Counties.

4. Defendant Robert Stewart is the Chief of the South Carolina Law Enforcement Division (SLED), the agency that has been delegated the authority of enforcing State's laws pertaining to video game amusement devices, and he is being sued in his official capacity under the authority of *Ex Parte Young*.

5. Defendant Henry McMaster is the Attorney General for the State of South Carolina and has been delegated the authority to bring civil forfeiture actions against video game amusement devices that are alleged to be illegal under South Carolina law. General McMaster is being sued in his official capacity under the authority of *Ex Parte Young*.

6. Defendant Ralph Hoisington is the Solicitor of the Ninth Judicial Circuit, which includes Charleston County and is the Chief prosecutor of the State's criminal laws relating to video game amusement devices within the Ninth Judicial Circuit in his official capacity under the authority of *Ex Parte Young*.

FACTS

7. Prior to July 2000, Plaintiffs owned and operated video game machines that contained free play features whereby players of the machines could legally redeem free game credits earned for non-machine cash pay-outs under South Carolina law, as recognized by the Supreme Court in *State v. Blackmon* decided in 1991.

8. From 1991, when *State v. Blackmon* was decided until on or about July 1999, the legality of providing non-machine cash payouts on video game machines with free play features became subject to a highly charged and intense political debate in the State of South Carolina.

9. Plaintiffs and other operators of video game machines with free play features were viewed as having significant political influence in the legislative affairs in the State of South Carolina.

10. In 1999, the State passed Act No. 125, which essentially delegated the question of whether non-machine cash payouts on video game machines with free play features should remain legal to the general public for a referendum scheduled to occur in November 1999.

11. On the eve of the election, in October 1999, the South Carolina Supreme Court declared that Act No. 125 was an unconstitutional attempt to delegate to the people of South Carolina the legislature's power in *Joy Time Distributors and Amusement Company, Inc. v. State of South Carolina*, 338 S.C. 634, 528 S.E.2d 647 (1999). The South Carolina Supreme Court

enjoined the referendum election, severed the unconstitutional provisions, and left the remaining provisions of Act No. 125 in place.

12. The surviving provisions of Act No. 125 repealed S.C. Code § 16-19-60, which exempted non-machine cash pay-outs on free game credits earned from the State's criminal gaming laws, thus making it a crime to give cash payouts on a video game machine with a free play feature on or after July 1, 2000.

13. In addition, Act No. 125 amended the State's Video Game Machines Act to make it illegal to simply possess a video game machine with a free play feature, irrespective of whether the video game machine was or even had been used for an illegal purpose. Specifically, Section 12-21-2710 was amended to prohibit any person from possessing or operating within the State:

> "any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punchboard, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether inwards or figures or, which deposit tokens or coins at regular intervals or in

varying numbers to the player or in the machine.

14. A person who violates the amended provision of S.C. Code 12-21-2710 is "guilty of a misdemeanor and, upon conviction, must be fined not more than $500.00 or imprisoned for a period of not more than one year or both."

15. Act No. 125 further amended S.C. Code § 12-21-2712 and provides for the civil forfeiture of any machine, board or other device prohibited by Section 12-21-2710 and requires that such device "must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, directed it be immediately destroyed." Section 12-21-2712 has further been interpreted by the State Supreme Court to provide a device owner with a post-seizure opportunity to come forward and show to a magistrate that the device should not be destroyed.

16. Act No. 125 did not, however, outlaw all types of video game machines or coin operated devices. Under S.C. Code § 12-21-2720 a person is required to purchase a biannual license from the South Carolina Department of Revenue in the amount of $50 and may operate a machine for the playing of music or kiddy rides. In addition, upon purchasing a biannual license in the amount of $200, a person may operate "a machine for the playing of amusements or video games, without free play feature, or machines of the crane type

operated by a slot and a machine for the playing of games or amusements, which has a free play feature, operated by a slot and the machine is of the non-payout pin table type with levers or flippers operated by the player by which the course of the balls may be altered or changed."

17. The distinction between a legal video machine or device and an illegal machine or device that violates Section 12-21-2710 requires expert analysis and a factual determination of whether the device pertains to "a game of chance." The determination turns on the amount of skill involved in the play of the amusement game or device.

18. Defendant McMaster contends that a video game or device pertains to games of chance if chance rather than skill predominates in determining the outcome of the game. Under this dominant factor test, as with all other formulas for distinguishing between skill and chance, whether a machine or device is a game of chance is not obvious from the general appearance of the game or device but requires expert investigation and analysis.

19. Defendant Stewart has at least one SLED agent who has received specialized education, training and experience to test, analyze and render opinions regarding whether a particular video game machine or device is a game of skill or chance.

20. The State of South Carolina has not enacted any regulations further defining the difference between a legal video machine or device that can be licensed under S.C. Code Section 12-21-2720 and an illegal video machine or device which constitutes an illegal

"device pertaining to games of chance" in violation of S.C. Code Section 12-21-2710.

21. The State of South Carolina does not have any inspection and licensing procedures whereby a machine owner can present a video machine to a regulatory or law enforcement agency for a determination of the machine's legality prior to purchasing a license and placing the machine in operation in the State of South Carolina. Under South Carolina law, the mere fact that the State has licensed a particular machine has no relevance whatsoever regarding the legality of that machine.

22. The Attorney General of the State of South Carolina who is constitutionally obligated to render legal opinions to members of the Legislature, is also precluded under South Carolina law from issuing an opinion as to whether any particular machine or class of machines is an illegal game of chance under S.C. Code § 12-21-2710.

23. Plaintiffs and other machine owners are denied an opportunity under South Carolina judicial procedure to present a machine to a judicial officer for a declaratory ruling on the question of whether the machine violates S.C. Code § 12-21-2710 prior to placing the machine in operation in the State.

24. The only opportunity that Plaintiffs and other prospective video machine owners have for a determination by the State of South Carolina as to whether a particular video machine is a legal amusement device or an illegal "device pertaining to a game of chance" is to place the machine in the public domain, have the machine seized by a law enforcement

officer, taken to a magistrate for an *ex parte* hearing to obtain an order of destruction, upon risk of forfeiture of property and criminal punishment. Additionally, under South Carolina procedure, a magistrate's jurisdiction is limited to the specific machines before the court and the magistrate's ruling is limited to those specific machines as they appeared on the day of the hearing. Thus, a ruling by a magistrate that a particular machine is a game of skill does not protect the machine from subsequent seizure and forfeiture nor does the ruling protect the machine owner from subsequent criminal prosecution.

25. S.C. Code § 12-21-2710's prohibition against possessing any "device pertaining to games of chance of whatever name or kind" read literally outlaws most all amusement games, including board games like Monopoly©, a simple deck of cards or dice, and a host of electronic games found on most home computers and cell phones such as mine sweep, solitaire, and most any game found at amusement video arcade parks in the State as well as commercial products sweepstakes found in supermarkets and grocery stores.

26. S.C. Code § 12-21-2710's prohibition against the possession of any "device pertaining to games of chance of whatever name or kind" is so broad and vague that the statute gives unfettered discretion to law enforcement in South Carolina to seize any type of device or video machine and obtain a judicial ruling of its illegality subjecting the machine owner to loss of equipment and criminal penalties.

27. S.C. Code § 12-21-2710's prohibition against the possession of any "device pertaining to games of

chance of whatever name or kind" is so broad and vague that it fails to give a person of ordinary intelligence fair notice that its contemplated conduct is forbidden by the statute and encourages arbitrary and erratic arrest and convictions.

28. Since July 2000, the effective date of Act No. 125's amendments to the State's Video Game Machines Act, the State has applied S.C. Code § 12-21-2710's prohibition against possessing any "device pertaining to games of chance of whatever name or kind" in an irrational, erratic and discriminatory manner.

29. Defendants have permitted the possession and operation of devices pertaining to games of chance that have been specifically ruled illegal in prior judicial rulings in video arcades catering to young children where children can redeem coupons for merchandise while seizing equipment and prosecuting owners of equipment of video amusement machines that have never been subject to any judicial ruling that are placed in bars, restaurants, nightclubs and convenience stores.

30. In addition, Defendants have taken inconsistent and contrary positions on the same types of video game machines. For example, the Chess Challenge video machine is a video game machine without a free play feature that contains rotating icons that can be stopped by pressing skill stop buttons. Defendant Hoisington examined the Chess Challenge machine and declared that the machine is a legal game of skill. Defendant McMaster and Defendant Stewart have reached opposite conclusions regarding the same type of machine, concluding that such machines are

illegal devices pertaining to a game of chance.

31. SLED Agents working under Defendant Stewart previously advised Plaintiff Lucky Strike, LLC and many other video machine operators that the GT type video game machine, which contains a menu of different video games, was legal to operate in the State and recommended to Plaintiff and other video machine operators to purchase these types of games. However, in April 2005, Defendant McMaster issued an opinion stating that the GT type machine is an illegal device pertaining to games of chance and subsequently SLED agents began seizing such equipment and prosecuting those persons who are in possession of such equipment.

32. Since 2000, Plaintiff Lucky Strike, LLC has had approximately 21 Chess Challenge skill machines, with a value in excess of $60,000.00 seized and forfeited to the State as illegal devices pertaining to games of chance. In addition, Lucky Strike, LLC has had more than $200,000.00 worth of GT type machines seized and forfeited to the State as illegal devices pertaining to the games of chance.

33. Since July 2000, Plaintiff Jimmy Martin has been manufacturing video game machines in South America and importing the machines in the State of Florida for operation in states other than South Carolina. Plaintiff Martin has attempted to design and manufacture a legal video amusement machine to be operated within the State of South Carolina but is unwilling to expose himself to the risk of criminal prosecution in order obtain a decision from the State of South Carolina on the legality of a particular video amusement game or other device. As a result, Plaintiff

Martin has been unable to do business in his home State, has been required to abandon property and has lost revenue and business opportunities.

34. Plaintiffs Lucky Strike, LLC and Jimmy Martin, are among a class of businesses and individuals referred to by Defendants as former video poker operators who are being subjected to discriminatory enforcement practices in an effort to deprive Plaintiffs of their ability to engage in meaningful political speech and debate.

FOR A FIRST CAUSE OF ACTION
(EQUAL PROTECTION)

35. Plaintiffs incorporate paragraphs 1 through 34 as fully and effectually as if stated verbatim herein.

36. The issue of whether a video amusement machine or device is an illegal device pertaining to a game of chance turns upon a factual inquiry as to the level of skill required to play the particular game, which can only be made after a full factual investigation and expert analysis has been conducted.

37. Under South Carolina law Plaintiffs can only obtain a determination on the legality of a proposed video amusement machine or other amusement device upon the condition that Plaintiffs subject themselves to imprisonment, fines and forfeiture of property if it is determined that the proposed video machine or other device is a "game of chance."

38. Requiring Plaintiffs to risk criminal prosecution and civil forfeiture in order to determine the legality of a proposed video game machine or other

device while allowing citizens of South Carolina to obtain administrative and/or judicial review to determine the legality of other business pursuits before risking criminal prosecution or loss of property is an arbitrary, capricious classification that is not rationally related to the purposes of the statute.

39. Plaintiffs are also being subjected to discriminatory enforcement of the laws pertaining to video game machines, including but not limited to, S.C. Code Section 12-21-2710, in an effort to restrict Plaintiffs' meaningful participation in the political process in South Carolina.

40. Plaintiffs are thereby being deprived of their rights to equal protection under the laws of the State of South Carolina in violation of the Fourteenth Amendment to the United States Constitution.

41. Plaintiffs are suffering and will continue to suffer irreparable harm for which there is no adequate remedy at law.

42. Plaintiffs are thereby entitled to preliminary and permanent injunctive relief prohibiting the enforcement of S.C. Code 12-21-2710 and 12-21-2712.

FOR A SECOND CAUSE OF ACTION
(DUE PROCESS/VOID FOR VAGUENESS)

43. Plaintiffs incorporate paragraphs 1 through 42 as fully and effectually as if stated verbatim herein.

44. S.C. Code § 12-21-2710's prohibition against possessing any "device pertaining to games of chance of whatever name or kind" read literally outlaws most all amusement games, including board games like

Monopoly©, a simple deck of cards or dice, and a host of electronic games found on most home computers and cellular telephones such as mine sweep, solitaire, and most any game found at amusement video arcade parks in the State as well as commercial products sweepstakes found in your local supermarkets and grocery stores.

45. S.C. Code § 12-21-2710's prohibition against the possession of any "device pertaining to games of chance of whatever name or kind" is so broad and vague that the statute gives unfettered discretion to law enforcement in South Carolina to seize any type of device or video machine and obtain a judicial ruling of its illegality subjecting the machine owner to loss of equipment and criminal penalties.

46. S.C. Code § 12-21-2710's prohibition against the possession of any "device pertaining to games of chance of whatever name or kind" is so broad and vague that it fails to give a person of ordinary intelligence fair notice that its contemplated conduct is forbidden by the statute and encourages arbitrary and erratic arrest and convictions.

47. S.C. Code § 12-21-2710 therefore is unconstitutionally vague and violates the due process rights of Plaintiffs as guaranteed by the Fourteenth Amendment to the United States Constitution.

48. Plaintiffs are suffering and will continue to suffer irreparable harm for which there is no adequate remedy at law.

49. Plaintiffs are thereby entitled to preliminary and permanent injunctive relief prohibiting the enforcement of S.C. Code 12-21-2710 and 12-21-2712.

Plaintiffs therefore respectfully requests that the Court enter an order enjoining enforcement of S.C. Code § 12-21-2710 and 2712 and for such other and further relief as the Court deems proper.

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Columbia, South Carolina
February 9, 2006

APPENDIX VII

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jimmy Martin and Lucky Strike, LLC,
Plaintiffs,

v.

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants.

March 23, 2006

Case No. 2:06-400-DCN

MOTION TO DISMISS

Defendants hereby move to dismiss this action on the grounds that (1) the Court lacks subject matter jurisdiction (Federal Rules of Civil Procedure 12(b)(1)); and (2) the Plaintiffs failed to state facts sufficient to constitute a cause of action (Federal Rules of Civil Procedure 12(b)(6)). These issues are more fully addressed in the attached Memorandum in Support of this Motion.

For the foregoing reasons, this action should be dismissed.

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ATTORNEYS FOR DEFENDANTS

March 23, 2006.

APPENDIX VIII

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jimmy Martin and Lucky Strike, LLC,
Plaintiffs,

v.

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants.

Case No. 2:06-400-DCN

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Summary of Argument

Plaintiffs' Complaint attempts through tenuous constitutional claims to have this Court rewrite South Carolina's laws prohibiting and forfeiting gambling devices. However, such Complaint fails to state a claim for relief. Therefore, for reasons explained more fully below, Plaintiffs' action should be dismissed. *See*, Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

As will be addressed herein, well-recognized principles of abstention by a federal court – in deference to state enforcement proceedings and procedures – dictate that Plaintiffs' action fails. Moreover, Plaintiffs' contentions as to the unconstitutionality of state gambling statutes (S.C. Code Ann. Section 12-21-2710 and 12-21-2712) – statutes which deem gambling devices to be contraband *per se*, and which specify the procedure for seizure, forfeiture and destruction of such devices – are wholly without merit. The South Carolina Supreme Court has consistently upheld as constitutionally valid Sections 12-21-2710 and 12-21-2712 as a necessary exercise of the State's police power. Moreover, decisions of the United States Supreme Court, as well as other federal courts, confirm the constitutionality of South Carolina's laws prohibiting gambling devices. Accordingly, this action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Argument

Plaintiffs have brought this action in federal court attempting to dismantle, or at the very least rewrite, South Carolina's entire statutory scheme deeming gambling devices to be contraband *per se*. Such devices are forfeited and destroyed by means of a statutory procedure which the South Carolina Supreme Court has consistently upheld as constitutional. With certain amendments, these laws declaring gambling devices to be illegal *per se*, and providing for their forfeiture have been on the books at least since the 1930s. Sections 12-21-2710 and 12-21-2712 have afforded the State a

constitutionally sound mechanism to deter the dissemination and proliferation of gambling devices throughout South Carolina over these many years.

Yet now, Plaintiffs have launched a wholesale, yet spurious, constitutional attack on these statutes, contending that enforcement pursuant thereto violates their rights to equal protection and due process. Specifically, Plaintiffs allege that "[r]equiring Plaintiffs to risk criminal prosecution and civil forfeiture in order to determine the legality of a proposed video game machine or other device while allowing citizens of South Carolina to obtain administrative or judicial review to determine the legality of other business pursuits before risking criminal prosecution or loss of property is an arbitrary, capricious classification that is not rationally related to the purposes of the statute." *Complaint* at 10. Plaintiffs also contend they "are being subjected to discriminatory enforcement of the laws pertaining to video gaming machines ... in an effort to restrict Plaintiffs' meaningful participation in the political process in South Carolina." *Id.*

In addition, Plaintiffs allege that § 12-21-2710 violates due process of law. They contend that inasmuch as § 12-21-2710 proscribes any "device pertaining to games of chance of whatever name or kind," such provision "read literally outlaws most all amusement games" include those found at amusement arcade parks "as well as commercial sweepstakes found in your local supermarkets and grocery stores." *Complaint* at 11. Moreover, Plaintiffs argue that §12-21-2710 "is so

broad and vague that the statute gives unfettered discretion to law enforcement in South Carolina to seize any type of device or video machine and obtain a judicial ruling of its illegality subjecting the machine owner to loss of equipment and criminal penalties." *Id.* Finally, Plaintiffs attack § 12-21-2710 on the basis that the statute "is so broad and vague that it fails to give a person of ordinary intelligence fair notice that its contemplated conduct is forbidden by the statute and encourages arbitrary erratic arrest and conviction." *Id. at 12.* As will be seen below, these constitutional challenges are without merit.

Principles of Abstention Require Dismissal of this Action

First, this matter should not be heard by a federal court. Based upon well-recognized principles of abstention – principles which give due deference to longstanding state procedures and proceedings involving the determination of the legality of gambling devices – other federal courts have required dismissal of actions similar to the lawsuit brought by Plaintiffs. For example, in *Jernigan v. State of Mississippi*, 812 F.Supp. 688 (S.D. Miss. 1993), the District Court addressed a suit brought by a video machine owner alleging that "his video poker machines are not gambling devices and that as such, his ownership and use of the machines are protected by the Fourth, Fifth and Fourteenth Amendments of the United States Constitution." 812 F.Supp. at 690. In its decision dismissing the action, the District Court in *Jernigan*

referenced the United States Supreme Court case of *Younger v. Harris*, 401 U.S. 37 (1971), therein noting that, in *Younger*, the Supreme Court had held that federal courts should not stay or enjoin pending state court proceedings, absent special circumstances. The *Jernigan* Court recognized that, even though state proceedings to enforce Mississippi's gambling laws were not technically pending, nevertheless, *Younger* mandated dismissal of plaintiff's federal action. In the words of the District Court in *Jernigan*,

> ... though *Younger* and its progeny do not stand as a bar to this court's granting relief to plaintiff against potential seizure and prosecution by the State, this court is of the view that the circumstances presented simply do not warrant the granting of such relief. The *Younger* Court observed that as a matter of equity, the federal courts should not act, "and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.*, 401 U.S. at 43-44, 91 S.Ct. at 750.

In summary, the federal court felt compelled to defer to state procedures to resolve the issues raised by plaintiff's lawsuit, dismissing the action as follows:

> [i]n the case at bar, plaintiff's allegations simply do not satisfy the heavy burden of demonstrating that intervention by this court is

warranted. As the court indicated in declining to grant a temporary restraining order in this case, Jernigan claims that he will lose money if state or federal law enforcement officials seize his video poker machines. However, the court did not and does not view this as "a potential irremediable constitutional violation of sufficient magnitude to warrant the interference of this court in either state or federal law enforcement." Injunctive relief would therefore not be appropriate.

In the court's opinion, neither can declaratory relief properly be granted in this proceeding. As indicated *supra*, plaintiff alleges in this action that his due process right to "a hearing prior to the seizing of [his] equipment or personal property" is threatened to be violated by criminal proceedings. Defendants argue, *inter alia*, that plaintiff has no property interest in his video poker machines, and that as a result, his due process rights could not be implicated by any seizure of those machines. Jernigan does not dispute that the ownership, possession, control or transportation of machines such as his could be declared illegal by the state legislature or by Congress as a valid exercise of government police powers. Nor does he dispute that he would not have a property interest in the machines if they had been declared illegal by these statutes .... His claim appears to be simply that his machines are not, in fact, "gambling devices"

within the meaning of any of the subject statutes. He contends that consequently, he does have a property interest in them such that defendants could not seize his machines without violating his due process rights. In other words, what Jernigan seeks is an adjudication that his video poker machines are not "gambling devices" under federal law or "slot machine[s] ... or similar ... devices" under state law; and on the basis that his ownership of the machines is not, in fact, illegal under these statutes, he wants an injunction against defendant's seizing his machines or prosecuting for his ownership of these machines. It is apparent from the record in this case that the question whether a particular machine is a "gambling device" depends, under either state or federal law, on the various features of the machine. In a case quite similar to that a bar, a Pennsylvania District Court refused to grant declaratory relief, explaining that the vague and conclusory allegations in plaintiff's complaint concerning an alleged constitutional violation were further compounded by the prospect of extensive factual battles over the various types and models of video poker machines .... [C]onsideration of the various characteristics of each game and each machine is the core of analysis under the statute. A declaratory judgment action to determine criminal liability in anticipation of criminal proceedings is appropriate when the declaration will settle the question presented

and terminate the entire controversy. The courts are to avoid using declaratory judgment to make abstract determinations or to try the controversy in piecemeal fashion .... If plaintiff's challenging is to the constitutionality of the Gambling Devices Act *as applied*, we cannot make such a declaration because the answer depends on the characteristics in video poker machines and to issue a declaratory judgment which will settle this controversy. This matter is better left to individual criminal proceedings where the facts may be developed and the statute applied on a case by case basis. *Pennsylvania Video Operators*, 731 F.Supp. at 719.

To entertain this action for declaratory relief by Jernigan would be to invite precisely this kind of piecemeal adjudication denounced by the court in *Pennsylvania Operators*. This court, as did that court, declines to issue that invitation.

In conclusion, the court is persuaded that the general policy of noninterference with state and federal prosecutions militates against this court's exercising its jurisdiction in this cause. The court is aware that as there has been no seizure of Jernigan's property and as there is no prosecuting currently pending against him, the court is not entirely foreclosed from entertaining this action. However, the court is not persuaded by the issues and allegations arising in this case that it should exercise its jurisdiction. Injunctive

> relief is clearly not required in the premises as there is no allegation of "great and immediate" irreparable injury. And the fact that a declaratory judgment by this court could not definitively resolve the issue of what machines are covered under the various statutes at hand counsels against the court's exercising its jurisdiction. Accordingly, it is ordered that the motion of the United States to dismiss the complaint is granted as is the request for dismissal by the State of Mississippi.

812 F.Supp. at 692-694.

And, in another case, *Taylor v. Siegelman*, 230 F.Supp.2d 1284 (N.D. Ala. 2002), the Court likewise held that *Younger* abstention required dismissal of a lawsuit brought in federal court by owners challenging seizure of their video game machines. Plaintiffs brought an action in the District Court of the Northern District of Alabama, contending that application of the statutes permitting seizure of their machines constituted unlawful takings without just compensation. In dismissing plaintiffs' action, the District Court stated:

> ... all of the plaintiffs' arguments are based on the assumption that their machines are legal under [Alabama law] .... Without first determining whether under Alabama law these machines are legal or illegal gambling devices, this court can make no further determinations –

> and the issue of the legality of these machines is not an appropriate question for this court to address under *Younger*. The determination of the legality of the machines is wholly a matter of state law.

230 F.Supp.2d at 1290-1291. The *Siegelman* Court referenced the *Jernigan* decision, discussed above. In the Court's view, the *Younger* doctrine of deference to state proceedings was controlling, again thereby requiring dismissal of the action in federal court:

> [s]imilarly, in *Jernigan v. State of Mississippi*, 812 F.Supp. 688 (S.D. Miss. 1993), the plaintiff asserted that his video poker machines were not gambling devices and thus, his ownership of the machines was protected by the Fourth, Fifth and Fourteenth Amendments to the Constitution. Therefore, he argued, seizure of the machines would deprive him of his property without due process of law. *Id.*, at 690. That court was "of the view that the circumstances presented simply do not warrant the granting of such [injunctive] relief," in reliance on the *Younger* Court's observation that, "as a matter of equity, the federal courts should not act, 'and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law ...'" *Jernigan*, 812 F.Supp. at 691, citing *Younger*, 401 U.S. at 43-44, 91 S.Ct. at 750.

The court finds that, even if the *Younger* abstention doctrine was not dispositive of the case before it, further cases from the United States Supreme Court are. In *Wooley v. Maynard*, the Court considered whether the plaintiff could proceed in federal courts for alleged violations of his civil rights given three arrests for violations of a state statute. The plaintiff served fifteen days in jail on the misdemeanor charges. *Id.* 430 U.S. 705, 708, 97 S.Ct. 1428, 1432, 51 L.Ed.2d (1977). On appeal, the state argued that the United States District Court was precluded from exercising jurisdiction under the "principles of equitable restraint enunciated in *Younger v. Harris," supra. Wooley*, 430 U.S. at 710-11, 97 S.Ct. at 1433-34. The Court stated that:

> It is correct that generally a court will not enjoin "the enforcement of a criminal statute even though unconstitutional," *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322 (1935), since "(s)uch a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of Younger," *Doran, supra*, 422 U.S. at 931, 95 S.Ct., at 2568 .... To justify interference there must be exceptional circumstances and a clear showing that an injunction is necessary

> in order to afford adequate protection of constitutional rights." *Spielman Motor Co., supra*, 295 U.S., at 95, 55 S.Ct., at 680.

In *Wooley*, the Court went on to note that "three successive prosecutions were taken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time." *Id.*, 430 U.S. at 712, 97 S.Ct. at 1434. None of the plaintiffs before this court allege that criminal charges have been brought against them personally.

Further explaining the abstention doctrine, the Supreme Court has stated that it "does not arise from a lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already commenced." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S., 619, 626, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986). The Court further noted with approval the uniform application by lower courts of the *Younger* principle to pending state administrative proceedings in which an important state interest is involved. *See id.*, 477 U.S., at 627, n. 2, 106 S.Ct., at 2723 n. 2. Additionally, that case states "[w]e have repeatedly rejected the argument that a

constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'" *Id.*, 477 U.S., at 628, 106 S.Ct., at 2723, citing *Moore v. Sims,* 442 U.S. 415, 427, n. 10, 99 S.Ct. 2371, 2379 n. 10, 60 L.Ed.2d 994.

While the plaintiffs themselves are not all parties to the state court actions pending against their property, they clearly have a justiciable interest in those actions. The fact that those cases are against their property rather than them as individuals, or individuals doing business as various establishments, does not change the application of the *Younger* doctrine which counsels against the exercise of jurisdiction in situations where state proceedings have already been commenced. *See Ohio Civil Rights Comm'n, supra.* This court notes that, should it proceed with this case on its merits, the state cases could theoretically find the seizures of the property in question justified as contraband under the Alabama statute and this court could, at the same time, reach an opposite conclusion. This result would advance no purpose as this court cannot "trump" a state court decision on questions of state law.

The court having considered the foregoing, the court is of the opinion that it must abstain from ruling on the merits of this case. The court finds

substantial litigation is occurring in the Alabama state courts which is dispositive of the plaintiffs' claims before this court. The court finds the very nature of this action makes it a matter of solely state law, in which this court should not meddle. No fact better emphasizes this point then the very basis for the plaintiffs' claims–that being two Opinions of the Justices of the Alabama Supreme Court and one opinion of the state Attorney General. Given plaintiffs' reliance on these opinions as the basis for their activities to be legal underscores the fact that this is a question for which the plaintiffs must seek redress in the state courts. Because the court finds the abstention doctrine dispositive of this case, the court does not reach the various other grounds for dismissal raised by the individual defendants, nor does the court express any opinion as to the merits of the plaintiffs' claims. The court finds solely those claims do not belong in this court.

The court having found that this case is not properly before it on the basis of the abstention doctrine, the court is of the opinion that each of the defendant's motions to dismiss is due to be granted. The court shall so grant said motions and dismiss this case by separate Order.

230 F.Supp.2d at 1296-1297.

Moreover, the Fourth Circuit has strongly warned against a federal court's interference with the resolution of state gambling issues. In *Johnson v. Collins Entertainment Co., Inc.* 199 F.3d 710 (4th Cir. 1999), the Fourth Circuit reversed the District Court on the basis that it should have abstained with respect to an action in federal court under RICO, seeking to enjoin video poker operators from paying out more than $125 daily to a customer at one location. The district court granted the injunction based upon its interpretation of state law, but the Fourth Circuit reversed, concluding that "... the district court improperly interfered with a state regulatory scheme whose design is at the heart of the state's police power." 199 F.3d at 715. In the words of the Fourth Circuit, "[t]he exercise of federal equitable discretion in this case supplanted the legislative, administrative, and judicial processes of South Carolina and sought to arbitrate matters of state law and regulatory policy that are best left to resolution by state bodies." *Id.* at 719-720.

In *Johnson v. Collins*, the Fourth Circuit relied upon *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), another abstention case which had held that federal courts should "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." 319 U.S. at 318. *See also, New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) [federal judiciary should abstain from deciding cases (1) "that present 'difficult questions of state law

bearing on policy problems of substantial public import whose importance transcends the result in the case than at bar' or whose adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"]. In addition, in *Johnson,* the Fourth Circuit noted that "[t]he fact that the South Carolina Supreme Court has now addressed some of the very state law issues in this case underscores the propriety of abstention in the first place." *Id.* at 721. Moreover, in the Fourth Circuit's opinion, "[t]he mere presence of a federal question ... cannot mask the quintessentially state character of this controversy." *Id.* at 721.

With respect to the Plaintiffs' right to have federal constitutional issues determined in federal court, the Fourth Circuit found that the state courts are as competent to adjudicate federal constitutional questions as are federal courts:

> [o]f course, federal courts decide questions of state law in innumerable contexts. Abstention remains the exception and the exercise of congressionally mandated jurisdiction remains the rule. *See Colorado River* [*Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)], 424 U.S. at 813, 96 S.Ct. 1236. Nonetheless, the state system does possess greater competence than the federal courts to decide questions of state law impacting state public policy, especially where state courts can fully vindicate any federal interest that may arise. *Burford*

> abstention requires that we assess the interest in having federal rights adjudicated in federal court against state interests in the control of state regulatory programs. *See Quackenbush* [*v. Allstate Ins. Co.*, 517 U.S. 706 (1996)], 517 U.S. at 728, 116 S.Ct. 1712. The adequacy of state court review diminishes plaintiffs' interest in a federal forum. *See Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 349, 71 S.Ct. 762, 95 L.Ed. 1002 (1951) ("As adequate state court review of an administrative order based upon predominantly local factors is available ... intervention of a federal court is not necessary for the protection of federal rights."). Here the inquiry militates in favor of abstention because state courts possess concurrent jurisdiction over plaintiffs' RICO claims. *See Tafflin v. Levitt*, 493 U.S. 455, 467, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). Indeed, the Supreme Court has affirmed its "full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law ... over which state courts presumably have greater expertise." *Id.* at 465, 110 S.Ct. 792.

199 F.3d at 722-723. Accordingly, the *Johnson* Court concluded that deference to the courts of South Carolina was required in order to preserve and protect the State's interest in the regulation and/or prohibition of gambling:

[a] State's interest in maintaining uniform regulation in an area of core state concern has long been a factor counseling abstention. *See, e.g., Quackenbush*, 517 U.S. at 725, 116 S.Ct. 1712; *Burford*, 319 U.S. at 326- 30, 63 S.Ct. 1098. Federal intrusions into state regulatory affairs may lead to "contradictory adjudications by the state and federal courts." *See Quackenbush*, 517 U.S. at 725, 116 S.Ct. 1712. Abstention enables the federal courts to respect state wishes to "prevent the confusion of multiple review of the same general issues." *See Burford*, 319 U.S. at 326, 63 S.Ct. 1098. In superceding the enforcement efforts of DOR and SLED with a detailed yet selective program of its own, the district court set itself up as an active participant in fashion-ing state public policy. When the federal courts step uninvited into the shoes of state courts and state enforcement agencies, there exists a needless risk of tension between the two systems and conflicting mandates for those affected by state regulation. *See Burford*, 319 U.S. at 327, 334, 63 S.Ct. 1098 ("sound respect for the independence of state action" may require abstention to avoid "needless federal conflict with [a] state policy"). Legal constraints cannot yield even to the noblest of intentions, for judicial visions of the social good will differ from issue to issue and from judge to judge, and will, if allowed to run unchecked, thwart the expression of the democratic will.

Id., at 725-726.

Here, the case for abstention is even stronger than the above-referenced cases. Numerous post-seizure proceedings are presently pending in state courts. It is our information that 6 hearings involving 22 GT machines are pending before various magistrates in South Carolina. Thus, *Younger* abstention principles dictate that this Court refrain from hearing this matter.

Decisions of the South Carolina Supreme Court Have Consistently Upheld South Carolina's Forfeiture of Gambling Devices Statutes

The South Carolina Supreme Court has, in recent decisions, consistently concluded that the statutes governing the forfeiture of gambling devices – §§ 12-21-2710 and 12-21-2712 – are constitutionally valid. Rejecting a variety of constitutional challenges, the Court has concluded that post-seizure hearings to determine the legality of machines or devices seized by law enforcement officers comport with the requirements of the Due Process Clause. Moreover, the Court has found that the forfeiture of contraband *per se* gambling devices is not a compensable taking under the Takings Clause of the Fifth Amendment. In addition, the Court recently held that a jury trial is not mandated with respect to the post-seizure hearing before the magistrate, provided by § 12-21-2712.

In *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000), the plaintiffs contended that Act No. 125 of 2000 (which amended §§ 12-21-2710 and 12-21-2712 to include video poker machines and other gambling devices) "should be enjoined because it effects a taking of their video gaming machines without compensation." However, the Court rejected such an argument, concluding that "plaintiffs are entitled to no compensation because their machines are *lawfully* subject to forfeiture as contraband." 341 S.C. at 302. In the Court's view , the issue of whether or not § 12-21-2710 and -2712 pass constitutional muster under the Due Process Clause had been settled by its previous decision of *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). The *Westside* Court reviewed the *192 Coin-Operated Video Game Machines* case and other decisions, stating as follows:

> [u]nder § 12-21-2712, gaming machines that are operated or possessed in violation of § 12-21-2710 are subject to forfeiture as contraband *per se*. *192 Coin-Operated Video Game Machines, supra*. Act No. 125 amends § 12-21-2710 to include the video gaming machines in question which will become subject to forfeiture under § 12-21-2712 as of July 1, 2000. We have already determined that the forfeiture of gaming machines pursuant to these statutes accords with due process requirements. *Id.* .... We see no reason to answer this question differently where

the forfeiture applies to video gaming machines that until recently were not contraband.

In determining whether the forfeiture of a particular type of property violates due process, we consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. See *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705, 17 S.Ct. 693, 41 L.Ed. 1169 (1897); *Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 529, 476 S.E.2d 477, 479 (1996). Gaming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture, *Lawton v. Steele*, 152 U.S. 133, 136, 14 S.Ct. 499, 38 L.Ed. 385 (1894), and we have consistently deferred to the legislature's determination of what gaming devices must be sacrificed for the public welfare. *See, e.g., Johnson v. Collins Entertainment Co.,supra*. Further, we have acknowledged the difficulty of enforcing statutes prohibiting gaming. *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), *overruled on other grounds, State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). As the United States Supreme Court has observed, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable.

> *Bennis*, 516 U.S. at 452, 116 S.Ct. 994 (*quoting Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974)). We conclude the forfeiture of gaming machines pursuant to §§ 12-21-2710 and -2712 comports with due process even when applied to machines that were previously lawfully possessed.

In *State v. 192 Video Game Machines, supra*, the Court stressed that delay of any opportunity for the owner to contest seizure of his machines until after seizure in no way violates due process. In the Court's view, "[t]he most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the *res* should not be forfeited and disposed of as provided for by law.'" 338 S.C. at 197, quoting *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981). Thus, so long as an owner is given the post-seizure opportunity to contest the forfeiture of such seized machines, no due process deprivation occurs. The Court's decision obviously shows no concern regarding unconstitutional vagueness as to § 12-21-2710, noting that "[w]e find no due process violation in this case." *Id.*

The Court's decisions in *State v. 192 Coin-Operated Video Game Machines* and *Westside* were recently reaffirmed in *Mims Amusement Co. v. SLED*, 366 S.C. 141, 621 S.E.2d 344 (2005). In *Mims*, the owner of a seized video machine contended that he had a constitutional right to a jury trial in a post-seizure

proceeding before the magistrate. However, in reversing the circuit court, the Supreme Court of South Carolina rejected such argument, concluding that

> [w]e recently held that a magistrate's ruling on legality applies only to the machine before the court. We further observed that a particular video gaming machine may be manipulated so as to change its nature from lawful to unlawful, which is one reason why the legality of a particular machine must be determined on an individual basis at the time of the seizure at the time of seizure and examination. *Allendale County Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004). We were not faced with the issue of a right to a jury trial in *Allendale* and our observation in that case is not dispositive. While a machine ultimately may be shown to be lawful in a post-seizure hearing before a magistrate, it is nevertheless deemed contraband *per se* at the moment of seizure. We conclude an owner's right to due process in the civil forfeiture of a video gaming machine under the state constitution and pertinent statutes is satisfied when he is given a postseizure hearing before the magistrate, with the right to appeal that ruling to circuit and appellate courts. *See* S.C. Code Ann. § 18-7-20 (Supp. 2004), § 14-5-340 (1976), § 14-3-330 (1976 & Supp. 2004), and § 14-8-200 (Supp. 2004). ... The owner of a video game machine seized by law enforcement authorities

> does not have a constitutional right to a jury trial in a civil forfeiture proceeding to determine whether the machine is an illegal gambling device because the device, at the moment of seizure, is deemed an item of contraband *per se*. The owner's constitutional right to due process of law is satisfied by a post-seizure hearing before the magistrate to determine the legality of a machine, with the right to appeal the ruling to higher courts.

366 S.C. at 155.

All of these decisions make it clear that South Carolina's procedure for seizure and forfeiture of alleged gambling devices set forth in § 12-21-2712, and as construed and validated by the South Carolina Supreme Court, does not violate the Due Process Clause. Moreover, any contention that § 12-21-2710 is unconstitutionally vague has been expressly rejected by the State Supreme Court in *State v. DeAngelis*, 257 S.C. 44, 183 S.E.2d 906 (1971). There, the Court addressed the issue of whether § 5-621, the predecessor of § 12-21-2710, is void for vagueness. While § 12-21-2710 has been amended, the specific language contained in the statute – "games of chance of whatever name or kind," language which is being challenged here – has always been a part of the statute and was present when *DeAngelis* was decided. Rejecting any contention of vagueness in the statute, the *DeAngelis* Court concluded:

> Appellant contends next that Section 5–621 is unconstitutionally vague, and for that reason the conviction cannot be sustained. An analysis of its wording convinces us that a man of reasonable intelligence is given fair notice of the machines proscribed; that the statute cannot be used in a capricious or discriminatory manner; and that the personal liberties guaranteed by the Bill of Rights are satisfied thereunder. The cases cited by appellant present inapposite factual situations, primarily in the civil rights field.

257 S.C. at 49.

Plaintiffs' Equal Protection Claims Are Also Without Merit

Plaintiffs contend that requiring them to risk criminal prosecution and civil forfeiture in order to determine the legality of their machines pursuant to §§ 12-21-2710 and 12-21-2712 is "an arbitrary, capricious classification that is not rationally related to the purposes of the statute." *Complaint* at 10. Plaintiffs also claim discriminatory enforcement. *Id.*

State v. 192 Video Game Machines, supra set forth the requirements for a claim for selective prosecution or discriminatory enforcement as follows:

> [t]o establish selective prosecution, a defendant must satisfy a two-prong test. First, a defendant

> must show "he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted." *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978). Second, "the defendant must demonstrate that the government's discriminatory selection of his prosecution was based upon an impermissible ground, such as race, religion, or his exercise of his first amendment right to free speech." *Id.* at 865. See also [*United States v. Armstrong*, 517 U.S. 456, 465 (1996)] ... ("The requirements for a selective prosecution claim draw on 'ordinary equal protection standards.' The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'") (citations omitted) ....

338 S.C. at 200.

It is well settled that the regulation or prohibition of gambling implicates no constitutionally protected right. As the United States Supreme Court recognized in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993),

> [a]s in *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), the activity underlying the relevant advertising – gambling – implicates no constitutionally protected right;

> rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.

See also, Caroll v. State, 361 So.2d 144 (Fla. 1978) [There is no constitutional right to conduct a gambling business ...."]; *State v. McCleary*, 65 N.C. App. 174, 308 S.E.2d 883 (1983) ["... there is no constitutional right to gamble, and it is generally held that the law may rightfully regulate or suppress gambling without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure."]

Thus, any claim of discriminatory enforcement or selective prosecution is without merit. Plaintiffs possess no constitutionally protected rights in the area of ownership or possession of alleged gambling devices.

Likewise, any argument that Plaintiffs are deprived of Equal Protection generally by enforcement of § 12-21-2710 against them likewise is without merit. In *O'Donnell v. City of Chicago*, 842 N.E.2d 208 (Ill. App. Ct. 2005), the Court concluded that an ordinance allowing a police officer discretion in determining whether he or she possesses sufficient information with respect to the illegality of alleged gambling devices in order to seize such device for subsequent forfeiture did not violate the Equal Protection Clause.

Moreover, the South Carolina Supreme Court concluded in *Sun Light Prepaid Phonecard Co. v. State*,

360 S.C. 49, 600 S.E.2d 61 (2004) that a distinction between illegal gambling devices and otherwise legal vending machines as delineated in § 12-21-2710 did not violate plaintiff's Equal Protection rights. In the Court's view, "the two machines are not similarly situated such that an equal protection claim may arise." 360 S.C. at 55, n. 6. Referencing *Whaley v. Dorchester Co. Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999) with respect to the applicable Equal Protection Clause, the Court reasoned that illegal gambling devices and vending machines which dispense promotional products are inherently different because "vending machines dispense promotional game products that are legitimate because their companies are attempting to promote the sale of these products." Gambling devices, of course, "... in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture" and it is up to the Legislature to determine "... what gaming devices must be sacrificed for the public welfare." *Westside Quik Shop, supra.* The Supreme Court made it clear in *Allendale Co. Sheriff's Office v. Two Chess Challenge II,*, 361 S.C. 581, 606 S.E.2d 471 (2004) that "video machines may be manipulated so as to change their nature from lawful to unlawful" and thus broad deference must be given to law enforcement in deciding "based upon probable cause" to seize machines deemed to violate § 12-21-2710. Thus, Plaintiffs' Equal Protection arguments based upon a challenge to §§ 12-21-2710 and 12-21-2712 are lacking in merit.

Conclusion

For all of the foregoing reasons, Plaintiffs' Complaint should be dismissed. A spurious constitutional attack on South Carolina's longstanding forfeiture procedure, a procedure designed to deter the proliferation of gambling devices in this State, should not be entertained by this Court. Thus, this Court should defer to ongoing state forfeiture proceedings. The courts of South Carolina are perfectly competent to address Plaintiffs' constitutional claims. Moreover, the South Carolina Supreme Court has consistently upheld §§ 12-21-2710 and 12-21-2712 against numerous constitutional challenges.

Accordingly, Plaintiffs' Complaint fails to state a claim for relief and should be dismissed.

Respectfully submitted,

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March 23, 2006.

APPENDIX IX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Jimmy Martin and Lucky Strike, LLC,
Plaintiffs-Appellants,

v.

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

Record No. 06-1829

PETITION FOR HEARING OR REHEARING *EN BANC*

Summary of Argument

Pursuant to Local Rule 35, in order to maintain the uniformity of this Court's decisions, the

Defendants-Appellees petition for hearing or rehearing *en banc*. The Panel's majority opinion contravenes settled precedent in this Circuit and is squarely inconsistent with the United States Supreme Court decision, *Holliday v. State*, 78 F.Supp. 918 (W.D.S.C.), *affd*. 335 U.S. 803 (1948), upholding as constitutional essentially the same state statutes attacked here. This case involves exceptional circumstances in that federal Court intervention intrudes upon the heart of the State's police power – South Carolina's authority to enforce its gambling laws. See *Johnson v. Collins Entertainment Co.*, 199 F.3d 710, 720 (4th Cir. 1999).

In concluding that abstention pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) is inapplicable, the decision overlooked controlling precedent. Holding that *Burford* does not apply because Plaintiffs are waging a facial constitutional attack upon South Carolina's gambling enforcement scheme itself, and thus are raising "vital" constitutional issues, the Court did not consider or follow *Holliday*. In *Holliday*, the United States Supreme Court summarily affirmed a three judge Court decision declaring the virtually identical predecessors to S.C. Code Ann. Section 12-21-2710 and 12-21-2712 valid against a challenge seeking to enjoin these statutes "as unconstitutional, null and void and in violation of the Fourteenth Amendment of the United States Constitution." 78 F.Supp. at 921. Before the Supreme Court, Plaintiff raised the questions whether these statutes violated the Due Process and

Equal Protection Clauses. *Id.* That Court upheld the ruling that the statutes were constitutional.

Thus, the Supreme Court has concluded that the predecessors to §§ 12-21-2710 and 12-21-2712 do not violate the Due Process and Equal Protection Clauses. Clearly, "lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'" *Hicks v. Miranda*, 422 U.S. 332, 334 (1975). Notwithstanding, *Holliday*, (*Appellees' Brief* at 51), the Panel still found abstention unwarranted. The majority gave primacy to federal claims which the Supreme Court has rejected. Therefore, it was error for the Court not to abstain here, because in balancing the particular federal interests with competing concerns "'for the independence of state action,'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996), *Holliday* reinforces that the "state's interests are paramount." *First Penn.-Pacific Life Ins.Co. v. Evans*, 304 F.3d 345 (4th Cir. 2002). The Supreme Court's favorable disposition of the constitutionality of South Carolina's gambling enforcement scheme tips the balance strongly on behalf of *Burford* abstention.

Moreover, the majority's conclusion is also inconsistent with decisions of this Court, as well as others of the Supreme Court. *Fralin and Waldron, Inc. v. Martinsville*, 493 F.2d 481, 483 (4th Cir. 1974), relied upon by this Court in subsequent *Burford* cases, involved a constitutional challenge to a zoning ordinance. As here, *Fralin's* challenge raised

vagueness and arbitrary enforcement. Yet, this Court required abstention, because state adjudication would "avoid needless friction in federal-state relations over the administration of purely state affairs." *Fralin* demonstrates, therefore, that similar constitutional challenges to Plaintiffs' do not immunize these claims from abstention. As the dissent duly noted, the Fourteenth Amendment does not "re-order[]" federal and state relations so as to "render *Burford* abstention virtually inapplicable to all constitutional challenges in federal court to specialized State regulatory regimes." *Slip Op.* at 18-19. Indeed, the Supreme Court has required abstention, notwithstanding a constitutional assault upon a Pennsylvania highway statute and the District Court's issuance of a "sweeping" injunction against the statute's enforcement for violation of Due Process. *Martin v. Creasy*, 360 U.S. 219 (1959). Despite these vital constitutional claims, *Creasy* held that the federal court should have "stay[ed] its hand [in deference to] the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature of constitutional questions." 360 U.S. at 224. Accordingly, the premise of the majority's decision is incorrect.

If a *Burford* exception for "constitutional challenges in federal court to specialized state regulatory regimes" now applies, an *en banc* Court should do it. In light of *Holliday* and other cases, a Panel decision – over a powerful dissent – should not adopt this far-reaching gambling enforcement standard

without briefing and argument. As the dissent observed, "[t]he majority does more, however, than exacerbate tensions [between dual governmental systems]. It authorizes lawsuits that will begin slowly to federalize – in all its aspects – questions of state gambling policy." *Slip Op.* at 32-33. Essentially, this decision holds that when the regulatory process is constitutionally attacked, such claims are decided by a federal court. That incorrect premise leaves *Burford* abstention to the mercy of an enterprising pleading. Therefore, the Petition should be granted.

Argument

The decision departs widely from precedent, creating an exception to *Burford* for a constitutional challenge to the regulatory scheme itself. *Slip Op.* at 12. Relying principally upon *Bath Mem. Hosp. v. Me. Health Care Fin. Commission*, 853 F.2d 1007 (1st Cir. 1988), the decision immunizes from abstention those federal claims alleging unconstitutionality of a statute "as written." Presumably, *Burford* would apply if Martin had "sought a federal declaration that specific machines were lawful under South Carolina law or a federal injunction seeking replacement of the State's forfeiture mechanism with one of the court's design." *Slip Op.*, at 13. Where, however, Martin has launched "only" a "*facial* attack on the state statutes *as a whole* – [the majority deems such is] ... precisely the sort of case federal courts often and expertly entertain" *Id.* at 10-11.

This is clear error. Neither this Court, nor the Supreme Court, recognizes such a legal distinction. As *First Penn, supra* states, *Burford* requires a District Court to engage in "a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action ....'" 304 F.3d at 348, quoting *Quackenbush, supra*. In *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (*NOPSI*), the Supreme Court articulated situations in which *Burford* abstention applies:

> [w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where "the exercise of Federal review of the question in a case *and in similar cases* would be disruptive of state efforts to establish a coherent policy with respect to matters of substantial public concern."

(emphasis added) quoting *Col. Riv. Water Cons. Dist. v. U.S.*, 424 U.S. 800, 814 (1976). Thus, *NOPSI* carves no exception for *particular kinds of federal claims*, nor distinguishes between federal claims where *Burford*

does not apply and those where it does. Indeed, *Burford's* purpose is to

> "balance[] the strong federal interest in having certain classes of cases, and certain federal rights adjudicated in federal court, against the State's interest in maintaining 'uniformity in the treatment of an essentially local problem ... and retaining local control over difficult questions of state law bearing on policy problems of substantial public import."

Quackenbush, 517 U.S., *supra* at 728. In short, *Burford* is not concerned with parties' rights, but is inspired by federalism's concerns. *Intl. College of Surgeons v. City of Chicago*, 153 F.3d 356, 361 (1998).

Language in *NOPSI* also undermines the Panel's "constitutional claim" exception to abstention and is particularly applicable to South Carolina's gambling enforcement proceedings. There, in the context of other forms of abstention, the Supreme Court rejected the argument that the District Court should "take a quick look at the merits" to see if the federal claim "is substantial" before deciding whether to abstain. The Court stated:

> ... constitutional challenges to state action ... call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet, it

> is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction .... [W]hat we look to is the importance of the generic proceedings to the State.

491 U.S. at 365. As one commentator writes regarding NOPSI's language,

> [t]he Court's emphasis ... is also consistent with the recognition that state courts are responsible for upholding the Constitution and its guarantees. Thus, it is appropriate for state courts to adjudicate cases raising constitutional claims when they have a strong interest in adjudicating a particular type of dispute.

29 *Fordham U.L.Rev.* 387, 410 (2001). It is clear, therefore, that the Supreme Court recognizes that federal constitutional claims – including attacks upon the regulatory scheme – are subject to abstention if the "balance" required by *NOPSI* tips favorably to the state's interest. Thus, the Court's reliance upon *Bath*, decided before *NOPSI* and *Quackenbush*, is misplaced. *See also, Creasy, supra*; *Fralin, supra*.

Moreover, the Court's characterization of Plaintiffs' claims as "facial" is erroneous. A facial vagueness claim, "means a claim that the law is

'invalid *in toto* – and therefore incapable of any valid application." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n. 5 (1982). As Judge Traxler has written, vagueness challenges to statutes not involving First Amendment freedoms are examined in light of the facts of the case at hand. *U.S. v. Williams*, 364 F.3d 556 (4th Cir. 2004). While a law not reaching constitutionally protected conduct under the overbreadth test still may be challenged as facially vague under due process, it must be impermissibly vague in all applications. *Village of Hoffman Estates, supra.* Furthermore, a discriminatory enforcement claim is not based "on the ground [that the statute] is unconstitutional on its face," but challenges "the manner of its administration." *U.S. v. Armstrong*, 517 U.S. 456, 466 (1996). Plaintiffs cannot "establish that no set of circumstances exists under which ... [these] Act[s] would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, their challenges are not facial.

Indeed, in *Holliday, supra*, the virtually identical predecessors to §§ 12-21-2710 and 12-21-2712 were upheld by the United States Supreme Court as constitutional against Due Process and Equal Protection Clause challenges – Plaintiffs' claims here. Compare, 78 F.Supp. at 925, n. 1 (fully quoting § 1301 *et seq.*) with §§ 12-21-2710 and 12-21-2712. Plaintiff, like Plaintiffs here, brought a pre-enforcement action in federal court to enjoin Sections 1301, 1301-1, 1301-1(2), as well as other provisions of the 1942 Code. Holliday claimed these provisions were

> unconstitutional, null and void and in violation of the Fourteenth Amendment of the United States Constitution, because the statutes treat, embrace, regard and include the same coin-operated amusement machines of the plaintiff as gambling devices *per se* and subject them to seizure and destruction as gambling devices *per se* although they are ultimately innocent and are not gambling devices *per se*; that their intended seizures and destruction, or any seizures and destruction of them are and would be, in violation of plaintiff's constitutional rights ....

78 F.Supp. at 921. Section 1301 included Section 1301-1 (formerly 1301-A), which is virtually identical to present day § 12-21-2710, banning machines "pertaining to games of chance of whatever name or kind." Section 1301-1(2) mirrors present § 12-21-2712, which requires law enforcement officers to seize such machines and take to a magistrate for review and subsequent destruction, if illegal. Thus, Holliday sought to enjoin both of these statutes as unconstitutional under the Fourteenth Amendment. 78 F.Supp. at 919-20.

A three judge Court heard the matter. The Court concluded that Plaintiff's machines were "games of chance" under state law because they "do not give a certain uniform return value for each coin deposited."

Id. at 925. Thus, the federal question involved whether Sections 1301-1 and 1301-1(2), *et al.* violated the Fourteenth Amendment and should be enjoined from state enforcement. The Court concluded that South Carolina's policy is to suppress gambling. Gambling in all forms is illegal in South Carolina." Gambling devices "promote and encourage the gambling instinct." *Id.* at 924. Accordingly, the Court held that the statute is "clearly a valid exercise of the police power of the State of South Carolina and constitutes no attempt on the part of the State to deprive plaintiff of his property without due process of law." *Id.* at 925.

Plaintiff directly appealed to the United States Supreme Court pursuant to 28 U.S.C.A. §§ 345 and 380. (Appellant's *Jurisdictional Statement*, 1948 WL 47341). The questions presented in *Appellants' Brief* (WL 47342) asked whether the statute violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Appellant's *Jurisdictional Statement* asserted its right of appeal and that the three judge Court erroneously failed to hold that the gambling statute "has no basis, is arbitrary and denies to the plaintiff his fundamental rights under the equal protection of the law clause and due process of law clause" of the 14th Amendment. WL 47341, *supra.* The Supreme Court, however, granted Appellee's *Motion to Affirm* and expressly affirmed the judgment of the three judge Court.

The Supreme Court has consistently defined the precedential value of summary affirmances by it. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) states the following:

> [s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by these actions.

In *Hicks v. Miranda, supra*, the Supreme Court noted that the summary affirmance in question sustained "the constitutionality of the very California obscenity statute ..." before the Court. 422 U.S. at 340. *Hicks* thus held the lower court erred in disregarding this summary affirmance – which the Court deemed controlling because, where the "issues are substantially the same," the summary affirmance is dispositive. *Id.* at 345, n. 4. Moreover, the Supreme Court looks to whether particular issues are "fairly comprised" within the questions presented by the *Jurisdictional Statement*, which are "not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559, n. 6 (1978). *See also, Comm. Party v. Whitcomb*, 414 U.S. 441, 451, n. 1 (Powell, J., et al., dissenting) [jurisdictional statement deemed "'to

include every subsidiary question fairly comprised therein...."] This Court has applied *Hicks* to conclude that a Supreme Court's summary affirmance is dispositive of a due process claim raised before a three judge Court which found a practice of law rule "rationally served the interest of Virginia ...." *Goldfarb v. Sup. Ct. of Va.*, 766 F.2d 859, 861-2 (4th Cir. 1985). Accordingly, the Supreme Court has concluded that what are now present §§ 12-21-2710 and 12-21-2712, including the very statutory language which Plaintiffs here attack – "pertaining to games of chance of whatever name or kind ..." – are valid under the Due Process and Equal Protection Clauses.

Therefore, in light of *Holliday*, and other cases cited, the Court's premise that the District Court abused its discretion by abstaining in light of Plaintiffs' paramount federal interests – i.e. facial constitutional challenges of §§ 12-21-2710 and 12-21-2712 "as written" – is clearly erroneous. In 1948, Holliday sought exactly what Plaintiffs seek today – to enjoin, based upon Fourteenth Amendment violations, the statutory scheme designed to prohibit the presence of gambling devices in South Carolina. However, the Supreme Court ruled that these Due Process and Equal Protection claims, which subsume Plaintiffs' claims, were unmeritorious. *Holliday*, *Creasy*, *NOPSI*, and *Fralin* thus all severely undermine the conclusion that Plaintiffs' challenge is "precisely the sort of case federal courts often and expertly entertain." *Slip Op.* at 11.

Accordingly, it was wrong to deem *Burford* abstention inapplicable here. Instead, *Burford's* requirements are clearly met. South Carolina's gambling statutes require "a machine by machine" analysis of a violation of § 12-21-2710. As the State Supreme Court held in *Allendale County v. Two Chess Challenge II*, 606 S.E.2d 471 (2004), the legality of two machines seized and brought before the Court may not be used to govern the legality of machines "operating in an identical manner." Such is "contrary to the machine-by-machine forfeiture process outlined in the statute and carried out in other cases." 606 S.E.2d at 474.

As the dissent observes, the majority incorrectly concludes that no "'difficult question of state law' is presented ... insofar as its basis is the South Carolina Supreme Court's holding that 'a man of reasonable intelligence is given fair notice of the machines proscribed' by the provision." *Slip Op.* at 24-25, referencing *Slip Op.* at 9, (which cites *State v. DeAngelis*, 183 S.E.2d 906, 908 (1971)). That Section 12-21-2710 is "clear," does not mean a "difficult question of state law" does not exist; a law may be quite unambiguous, but present difficulties in application. Without *Burford* abstention, the District Court, faced with Plaintiffs' claims of vagueness, unequal enforcement and procedural Due Process, will become enmeshed in applying § 12-21-2710's "games of chance" language. Such application, using a machine-by-machine analysis, will inevitably make a federal court a "super magistrate," who must apply an area of

state law which is an increasingly daunting task to apply, as technology in video gaming becomes more complex. *Allendale, supra.*

Moreover, video poker was banned in South Carolina only in 2000. The State Supreme Court squarely held in *Allendale* just three years ago that §§ 12-21-2710 and 12-21-2712 requires a "machine-by-machine" analysis. Thus, for a federal court to intervene here would clearly "be disruptive of state efforts to establish a coherent policy with respect to matters of substantial public concern." *NOPSI, supra.* While the possible setting aside of a "core" state function is itself insufficient for abstention, that is not the point here. In light of the United States Supreme Court's conclusion in *Holliday* that South Carolina's gambling enforcement scheme is constitutional – and in view of *Johnson v . Collins* recognition of the vital importance of the state's interest in establishment of state gambling policy – it is well within the District Court's discretion to leave to the state courts consideration of Plaintiffs' arguments, including any discriminatory enforcement claim.

Finally, the State did not "misread" *Johnson v. Collins* nor "mischaracterize" Plaintiffs' claims. *Slip Op.* at 12-15. The majority took the State to task for what it considered a misplaced reliance upon *Collins*, even though the District Judge and the panel's dissenting Judge (who authored *Collins* and many other abstention opinions) likewise placed considerable reliance thereupon. Both Judges concluded that,

balancing the competing federal and state interests involved, as required by *Collins* and other decisions, abstention is warranted here. *See also, First Penn., supra*; *Meredith v. Talbot Co. Md.*, 828 F.2d 228, 231 (4th Cir. 1987) [abstention enables "federal courts to avoid needless conflict with the administration by a state of its own affairs."] Moreover, with all due respect, we hardly mischaracterized Plaintiffs' claims, either. As the dissent cogently states, Plaintiffs' procedural Due Process claim, in essence, seeks reversal of the "machine by machine" analysis of *Allendale, supra,* as well as an overturning of that Court's decision in *State v. 192 Coin Operated Game Machines*, 525 S.E.2d 872 (2000) holding that an owner is entitled only to a post-seizure hearing. *Slip Op.* at 31 [Plaintiffs "endeavor to replace South Carolina's current scheme with a system of their own design."]. The Supreme Court has consistently held that the Due Process Clause requires no more where machines or devices are declared by law to be contraband *per se*. See *Lawton v. Steele*, 152 U.S. 133, 136 (1894) [state's police power includes "everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."]; *Helton v. Hunt*, 330 F.3d 242, 247-248 (4th Cir. 2003) [contraband *per se* is not "property" under Due Process Clause, Court observing that South Carolina's gambling forfeiture statute (§ 12-21-2712) provides the "modicum of process" necessary to comply with Due Process]. Thus, until *Holliday* is overruled, South Carolina's gambling statutes are constitutional and

not, as the majority held, (*Slip. Op.* at 13) subject to a direct facial attack.

Conclusion

For all the foregoing reasons, the District Court did not abuse its discretion in abstaining under *Burford*.

Respectfully submitted,

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APPENDIX X

IN THE SUPREME COURT OF THE UNITED STATES

T. B. Holliday, et al.,

Appellants,

v.

The Governor of the State of South Carolina, et al.,

Appellees.

No. 249.

October Term, 1948.
August 28, 1948.

Appeal From the District Court of the United States for the Western District of South Carolina

Statement as to Jurisdiction

Henry H. Edens, Henry Hammer, Counsel for Appellants. Chandler, Belk & Chandler, Of Counsel.

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Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, 1939, as amended, the above named plaintiffs and appellants file this, their separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction to review the Decree and

Order of dismissal appealed from herein, as follows:

A
Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the appellate jurisdiction of the Supreme Court are Sections 238 and 266 of the Judicial Code as Amended (28 U. S. C. A. Sections 345 and 380).

B
The Statute of the State, the Validity of Which Is Involved

The statute of the State of South Carolina, the validity of which is involved, is Section 1301 of the Code of Laws of South Carolina for 1942, which reads as follows:

"SECTION 1301 CODE OF LAWS OF SOUTH CAROLINA 1942"

"Slot machines unlawful, except those giving certain returns.--It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State, any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return value for each coin deposited therein, and in which there is no element of chance. Any person who shall violate this section shall be subject to a fine

of not more than one hundred dollars, or imprisonment upon the public works of not more than thirty days."

"SECTION 1301-1. UNLAWFUL TO KEEP OR OPERATE VENDING OR SLOT MACHINES, PUNCH BOARD, ETC. PERTAINING TO GAME OF CHANCE.

(1) *Certain* machines *excepted.-It* shall be unlawful for any person, firm or corporation to keep on his, her or its premises, or operate or permit to be kept on his, her or its premises, or operated within this State, any vending or slot machine, punch boards, pull boards, or other device pertaining to games of chance of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform*3 and fair return in value for each coin deposited therein, and in which there is no element of chance. Any person, firm or corporation violating this section shall be subject to a fine of not more than five hundred ($500.00) dollars, or imprisonment upon the public works of the county wherein the offense is committed or in the State Penitentiary for a period of not more than one (1) year or both fine and imprisonment, in the discretion of the Court: *provided,* that this section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to games of chance, that display different pictures, words or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine."

"(2) *Seize said machines--magistrates to order destruction.--Any* vending or slot machine, punch board, pull board, or other device pertaining to games of chance, prohibited by this section shall be seized by any officer of the law and at once taken before any magistrate of the county in which such machine is seized, who shall immediately examine same, and if he is satisfied that such vending or slot machine is in violation of this section or any other law of this State, he shall direct that said machine be immediately destroyed."

"(3) *Destruction of machines already seized.--All* vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance, which have heretofore been seized under any law and not destroyed shall be immediately disposed of as provided herein, for machines seized under the provisions of this section."

"(4) *Supplemental to section 1301-destruction of machines already seized.-- This* section is intended to be in addition to and supplemental to section 1301, and all vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance, which have heretofore been seized under any law and not destroyed shall be immediately disposed of as provided for in subsection 2 of this section, for machines seized under the provisions of this section."

The cases of the South Carolina Supreme Court

holding that coin operated pin table machines with free play features are gambling devices per se, and therefore fall within the prohibition of the aforesaid statute are as follows:
Alexander v. Martin, 192 S. C. 176;
Alexander v. Hunnicutt, 196 S. C. 364;
State v. Appley, 207 S. C. 284;
Ingram v. Bearden, (Opinion Number 16069, filed April 26th, 1948), Westbrook's Advance Sheets, May 1st, 1948.

C

Date of Decree and Date of Application for Appeal

The date of the Decree and Order sought to be reviewed is the 20th day of July, 1948, and the date upon which application for appeal is presented is the 22nd day of July, 1948.

D

The Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied On

This action is one wherein the plaintiffs seek to enjoin the enforcement of Section 1301 of the Code of Laws of South Carolina for 1942 as construed by the South Carolina Supreme Court on the ground that it is an unlawful interference with the business of operating and otherwise dealing in providing amusement through the media of coin operated pin tables with free play feature, and that such interference is in violation

of Section 1, Article 14, (14th Amendment) of the United States Constitution.

The proceedings herein put in issue the validity of the aforesaid statute and decisions of the South Carolina Supreme Court and raise the substantial question as to whether the enforcement of the aforesaid statute as construed by the South Carolina Supreme Court, in reference to plaintiff's business, which he claims is inherently innocent, deprive the plaintiff of his property without due process of law and denies to him the equal protection of the law under Section 1, Article 14, (14th Amendment) of the United States Constitution. Application to a Court of three Judges for an interlocutory injunction under Judicial Code, Section 266, was denied. On the hearing for the interlocutory injunction it was agreed that the case be submitted for final Decree upon the merits at which time the application for permanent injunction was also denied and the complaint dismissed on the merits. The plaintiff contends that the Rulings, Order and Decree of the specially constituted District Court is erroneous for the reason that the court failed to hold that the aforesaid statute as construed by the South Carolina Supreme Court declaring the pin tables involved in the instant case gambling devices per se has no basis, is arbitrary and denies to the plaintiff his fundamental rights under the equal protection of law clause and due process of law clause of Section 1, Article 14, (14th Amendment) of the United States Constitution.

Appended hereto is a copy of the Opinion and Order

delivered upon the rendering of the Decree sought to be reviewed.

E

Cases Believed to Sustain Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of this appeal:
Interstate Busses Corporation v. Bladgett, 276 U. S. 245;
Clark v. Poor, 274 U. S. 554;
Smith v. Wilson, 273 U. S. 388, 391;
Moore v. Fidelity & Deposit Co., 272 U. S. 317, 320;
Ex parte Buder, 271 U. S. 461, 464, 465;
Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196, 206;
Shaffer v. Carter, 252 U. S. 37, 44

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 238 and 266 of the Judicial Code as Amended (28 U. S. C. A. Section 345 and 380).

Appendix not available.

APPENDIX XI

IN THE SUPREME COURT OF THE UNITED STATES

T. B. Holliday et al.,

Appellants,

v.

Governor of State of South Carolina, Attorney General of State of South Carolina, Olina, R. H. Bearden, Sheriff of Greenville County, South Carolina, and All Law Enforcement Officers of the State of South Carolina,

Appellees.

No. 249.

October Term, 1948.
August 28, 1948.

Appeal From the District Court of the United States for the Western District of South Carolina

Brief in Opposition to Motion to Dismiss or Affirm

Henry Hammer, Henry H. Edens, Columbia, S. C., Chandler, Belk & Chandler, Greenville, S. C., Attorneys for Appellants.

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STATEMENT

This matter is before the Court on motion of appellees to dismiss or affirm the appeal herein.

The appellants brought the instant suit in the United States District Court for the Western District of South Carolina to enjoin the enforcement of Section 1301 of the Code of Laws of South Carolina for 1942 as construed by the South Carolina Supreme Court on the ground that such enforcement violates the rights of the appellants under the due process of law and equal protection of law clauses of the 14th Amendment to the United States Constitution. An interlocutory injunction was also sought and the case was therefore heard by three Judges under the provisions of Section 266 of the Judicial Code. On the hearing for the interlocutory injunction the case was submitted by counsel for final decree upon the merits. The application for interlocutory injunction as well as permanent injunction was denied and the complaint dismissed on the merits by the three Judge Court which held that the above statute of South Carolina was valid.

The appellants duly applied for and were allowed an appeal to the Supreme Court of the United States from the Rulings, Order and Decree of the specially constituted United States District Court for the Western District of South Carolina, and by virtue of Sections 238 and 266 of the Judicial Code as amended (28 U. S. C. A. Sections 345 and 380) this Court has jurisdiction of the instant appeal.

QUESTIONS INVOLVED

The appellees seek to dismiss or affirm under the provisions of Rules 7 and 12 of the Rules of the

Supreme Court of the United States upon the ground that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument. The instant appeal presents the following questions, which the appellants allege are substantial for a determination of the appeal herein.

(a) What is the purpose of Section 1301 of the Code of Laws of South Carolina for 1942?

(b) Does the legislative enactment as construed by the South Carolina Supreme Court under the above statute accomplish or tend to accomplish the purpose for which it was enacted?

(c) Does the above statute deprive the Appellants of their rights in violation of the due process of law clause of the 14th Amendment to the United States Constitution?

(d) Does the above statute deny to the Appellants the equal protection of the law in violation of the 14th Amendment to the United States Constitution?

ARGUMENT

Point A

The manifest purpose of the South Carolina Statute in question is to outlaw or suppress gambling devices per se.

It is a fundamental rule that in determining the constitutionality of a statute the courts will inquire into the purpose and object of the statute involved.

Section 1301 of the Code of Laws of South Carolina for 1942 declares it unlawful for any person, firm, or corporation to keep or operate on his, her, or its premises, any vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance, and provides that this Section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to games of chance that display different pictures, words, or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine. (Emphasis added.)

The Supreme Court of South Carolina in the cases of *Alexander v. Hunnicutt*, 196 S. C. 364, *Alexander v. Martin*, 192 S. C. 176, and *Ingram v. Bearden*, 47 S. E. (2d) 833, has interpreted the aforesaid statute to include within the prohibition thereof coin operated non payout pin tables with or without free play feature as gambling devices *per se*.

Omitting for the present the consideration of the pin tables in question, a careful scrutiny of the statute makes it manifest that the purpose of the legislature in enacting such statute was to outlaw those devices which are in and of themselves gambling devices or gambling devices *per se*, and which obviously cannot be used for legitimate purposes without gambling. This conclusion is readily deducible from a consideration of the objects specifically named in the statute, which objects are obviously gambling devices *per se*. The conclusion that the purpose of the legislation was limited solely to the suppression or elimination of gambling devices *per se* and not to gambling in general is also supported by the language in the case of *Ingram v. Bearden, supra*, the most recent case dealing with the machines in question, wherein the Court said, "the type of Pin Table machine in question was declared to be a gambling device *per se* in the *Alexander case, supra*, and because of that fact was subject to confiscation under Section 1301-1 of the 1942 Code". (Emphasis added.) The conclusion that the statute was enacted solely for the purpose of eliminating gambling devices *per se* and not for the purpose of suppressing gambling in general also finds support in the fact that the legislature of South Carolina effectively dealt with the problems of gambling in general by virtue of the provisions of the gambling statute set forth in Sections 1738-1749 of the Code of Laws of South Carolina for 1942.

For the above reasons we respectfully submit that the

manifest purpose of the statute in question was solely to eliminate or suppress those devices which in and of themselves are gambling devices, or gambling devices *per se,* and which obviously cannot be used for legitimate purposes of entertainment or recreation without the presence of the element of gambling.

Point B

The legislative enactment in question as construed by the South Carolina Supreme Court bears no reasonable relation to the purpose for which it was enacted.

We have shown the manifest purpose for which the statute in question was enacted, and, taking the statute to mean what the highest court of the State says it means, *Guaranty Trust Co. v. Blodgett,* 287 U. S. 509, we now proceed to a consideration of the question as to whether or not the statute as construed bears a reasonable relation to the purpose for which it was enacted in order to reach a conclusion as to whether or not it is unconstitutional as being repugnant to the 14th Amendment of the United States Constitution.

We readily admit and concede that it is within the police power of the State to outlaw, suppress and eliminate gambling devices *per se,* and if the pin table machines in question are gambling devices *per se* we have no standing in this Court. We respectfully

contend, however, that the pin table machines in question are not gambling devices *per se* and as such the inclusion of them within the prohibition of the legislative enactment bears no reasonable nor substantial relation to the object sought to be attained by the passage of the statute, to wit, the suppression or elimination of gambling devices *per se.*

It is a well established principle of law that when the constitutional protection is sought to be invoked it is' the duty of the Courts to determine whether the challenged provision of a statute bears a reasonable relation to the object sought to be attained by the passage of such provision. *Burns Baking Company v. Bryan,* 264 U. S. 504; *Welch v. Swasey,* 214 U. S. 91; *Dobbins v. Los Angeles,* 195 U. S. 222; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540; *Mugler v. Kansas,* 123 U. S. 623; and the reasonableness or unreasonableness of a State enactment is always subject to review by the Federal Courts to determine whether or not such enactment is repugnant to the 14th Amendment of the United States Constitution. *Meyer v. Nebraska,* 262 U. S. 390; *Adams v. Tanner,* 244 U. S. 590.

Although there is diversity of opinion among the courts of the various states as to whether or not pin tables of the type in question are gambling devices *per se,* we respectfully submit that the weight of sound reasoning and good logic fortifies our contention that the machines in question are not gambling devices *per se, Chicago Patent Corporation v. Genco, Inc.* (CCA 8th)

(1941) 124 Fed. (2d), 725; *Washington Coin Machine Association v. Callahan* (U. S. Circuit Court of Appeals D. C.) (1944) 142 Fed. (2d), 97; *Brafford v. Calhoun,* 72 Ohio. App. 920, 51 N. E. (2d), 920; *Gayle v. Whealan,* 59 Cal. App. (2d), 255, 138 P. (2d), 763; *Commonwealth v. Mihlow,* 142 Pa. Super, 433, 16 A. (2d) 656. The record in the instant case will disclose that the pin table machines in question are constructed and adapted for amusement and recreational purposes only; that the operation of them involves elements of skill and that there is no element of gambling in the playing of these machines as the term "gambling" is commonly understood by the average reasonably prudent person.

We respectfully submit that the instant case squarely raises the issue as to whether or not the State of South Carolina, through the legislature and the courts arbitrarily treated the pin table machines in question as gambling devices *per se* and thus deprived the appellants of their rights under the 14th Amendment to the United States Constitution; and we urge that the question is most substantial and should be determined by this Court after a full and complete review of the statute, the purpose thereof, and an examination of the facts in order to make an independent determination as to whether or not the machines in question are of such nature so to be classified as gambling devices *per se, Truax v. Corrigan,* 257 U. S. 212; *Pollock v. Williams,* 322 U. S. 4, and in order to determine whether or not the inclusion of such machines in the statute bears a reasonable relation to the manifest

purpose of the statute, to wit, outlawing of gambling devices *per se.*

The appellees rely on the case of *Murphy v. California,* 225 U. S. 623. In the *Murphy case* the Court, in sustaining the validity of a state statute prohibiting the keeping of billiard tables for hire or public use, stated, "The ordinance is not aimed at the game, but at the place." The instant case is clearly distinguishable for the reason that the statute in question aims directly at the game and not at the place, and if the game is inherently innocent and not a gambling device *per se,* the statute in question, by the inclusion of the pin table machines involved, cannot and does not have any reasonable relation to the object sought to be obtained by its passage. The Court also sustained the statute on the basis of judicial notice of facts which are entirely lacking and totally absent in the case at bar.

The appellees also rely on the case of *Durant v. Bennett,* 54 Fed. Rep. (2d) 634, which is clearly distinguishable from the instant case. The *Durant case* dealt with a slot machine known as the "one-arm bandit" type and obviously could not be used for any other purpose than gambling. The type of machine in question was not before the Court. A perusal of the record makes it apparent that the pin table machines in question are entirely different and distinguishable from the slot machines involved in the *Durant case.*

Perhaps it might not be amiss to state at this time that the courts m the past have associated coin operated

machines of every type with the old "one-arm bandit type" adapted and constructed for easy and fast gambling and for this reason have been prejudiced against them and most reluctant to treat the type of machine in question as being different from the old type of coin operated gambling devices. It is true, as stated by the courts, that the old type of slot machine adapted for easy and fast gambling has been changed in minor particulars in an attempt to bring them within the law and such changes were merely subterfuges and the machines were still adapted for easy and fast gambling and were consequently held to be gambling devices *per se*. The machines in the instant case, however, are not constructed and adapted for fast and easy gambling and have no resemblance in any manner, shape or form to the old coin operated gambling devices, the only similarity between the two types being that they are both operated by the insertion of a coin. On the contrary, with the advent of new developments, material changes and improvements upon the so-called pin table machines, the playing of these machines has become a game of skill, entertainment and amusement, and the philosophy of the courts in the treatment of the old type of coin operated machine is not suited to the present day machine, the condition and circumstances surrounding their operation. We know, from common experience, that unlike the old type of gambling device, the modern pin table machines are played by doctors, lawyers, judges, office workers, laborers, and others in all walks of life, for entertainment and purposes of diversion and relaxation from the monotonous routine

of their work or profession, and that they are found in places of high repute, including church recreation halls, teen-age canteens, service clubs, and community recreation centers. The courts in recent years, in keeping with the philosophy suited to meet the changing conditions of the machines and the present day circumstances surrounding their operation, are beginning to recognize that the type of pin table machine in question is not in any material way connected with the old form of coin operated gambling devices and consequently have refused to follow the old line of decisions holding that such machines are gambling devices *per se*. The sound reasoning and logic of holding that the pin table machines in question are not gambling devices *per se* are clearly brought out in the opinions of the *Washington Coin case, supra,* and *Chicago Patent case, supra.* We respectfully submit that, after thoroughly analyzing and scrutinizing the operation and mechanics of the type of machine in question, in the light of the philosophy that the law is a progressive science and will adapt itself to new conditions as they arise, *Holden v. Hardy,* 169 U. S. 366; *Dobbins v. Los Angeles, supra,* and in the exercise of sound logic, the conclusion is inescapable that such machines are not gambling devices *per se,* and therefore, this court, in the performance of its judicial function affording the constitutional protection to all forms of lawful amusement, entertainment and recreation which are useful as part of our everyday life, should declare the legislative enactment in question, as construed by the Supreme Court of South Carolina, as arbitrary, unreasonable and having no relation to the

object of suppressing gambling devices *per se.*

The other cases relied upon by appellees are decisions of the state courts which deal generally with the right of the states to eliminate those devices which tend to promote gambling, and do not deal with the elimination of gambling devices *per se,* which was the clear intention of the legislature in enacting the statute of South Carolina in question.

Point C

The Statute in question as construed by the South Carolina Supreme Court deprives the Appellants of their rights in violation of the due process of law clause of the 14th Amendment to the United States Constitution.

We respectfully submit that although the state under its police power has the right to suppress and outlaw gambling devices *per se,* yet if the statute in question does not accomplish that object because of the inclusion within the prohibition thereof of devices which are not gambling devices *per se,* such legislative enactment is repugnant to the due process of law clause of the 14th Amendment to the United States Constitution. *Burns Baking Company v. Bryan, supra.*

We have pointed out the manifest purpose of the statute and the fact that the inclusion of the pin table machines in question do not accomplish nor tend to

accomplish such manifest purpose of the statute; and for these reasons we respectfully submit that the statute is unconstitutional in accordance with the decisions of this Court.

Conceding, for the purpose of argument, but not admitting, that the statute in question is not limited to the elimination only of gambling devices *per se,* but is broad enough to make its purpose the elimination of gambling in general, we still contend that the inclusion of the pin table machines in question within the prohibition of the statute does not even accomplish nor tend to accomplish the elimination of gambling in general. As heretofore pointed out, in accordance with the decisions enunciated by this Court, we respectfully submit that this Court should inquire into and review the reasonableness or unreasonableness of the state enactment in order to determine its constitutionality. Such review will indicate that the operation of the type of pin table machine in question involves the element of skill, arouses the competitive spirit, and is beneficial to individuals as a form of relaxation, entertainment and amusement. Relaxation, entertainment and amusement are playing an ever increasingly important role in our American life, and in accordance with such philosophy suited to present day conditions, we respectfully urge that the statute in question deprives the appellees of their fundamental rights under the due process of law clause of the 14th Amendment to the U. S. Constitution. The appellees urge that the statutory provisions should be upheld as an appropriate method of preventing gambling. That such

evils exist in some degree in connection with the pin table machines is undoubtedly true "as it unfortunately is true in respect of the same or similar evils" in other kinds of amusements and entertainments such as golf, baseball, bowling, etc. But as this court stated in the case of *Tyson & Bro.-United Theatre Ticket Officers v. Banton*, 273 U. S. 418:

"evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. * * * It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.

"What this court said in *Adams v. Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917-F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917-D, 973, in the course of its opinion holding invalid a statute of Washington penalizing the collection of fees for securing employment, is apposite:

" 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully

directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.' "

The tendency of what is generally or ordinarily or often done in operating the type of machines in question is not towards that which is admittedly immoral or pernicious. The machines in question are unlike billiard or pool tables for hire dealt with by this Court in the *Murphy v. California case, supra,* where two or more players usually participate in a single game for the purpose of gambling. In the operation of the type of machine before the court, the exercise of skill, amusement, recreation and fostering of the competitive spirit are the predominant elements. The element of gambling is the exception and is only incidental to the game just as it may be in the games of baseball, tennis, golf, and others, which are admittedly useful as part of our present everyday American way of life. The evil of gambling in general, which may be incidental to the operation of the machines in question, seems to have been effectively dealt with by the state in enacting the provisions of Sections 1738-1749, Code of Laws of South Carolina for 1942.

For the reasons aforementioned we respectfully submit that the instant case presents for the determination of this Court the serious question as to whether or not the

statute assailed violates the due process clause of the 14th Amendment to the United States Constitution.

Point D

The South Carolina statute in question as construed by the Supreme Court of South Carolina denies to the Appellants the equal protection of the law.

Assuming that the statute in question as construed by the South Carolina Supreme Court was a valid exercise of police power we contend that it is unconstitutional in that it denies to the appellants the equal protection of the law because it permits the operation of coin operated weighing machines which have a free guess feature and prohibits the operation of the machines in question. The distinctions and classifications sought to be drawn by the statute in question are arbitrary, are not based on natural grounds of reasonableness or public policy, and do not tend to promote the public welfare. The statute in question in effect permits the operation of coin operated weighing machines with free guess feature and prohibits the operation of the machines in question without any reason for the distinction. It also appears that the legislature (Sec. 1738, Code of Laws of S. C., 1942) expressly permits the game of bowling which is very analogous and similar to the pin table game in question in that they both involve the use of skill and an equal amount of balls may or may not be used by the same or different players for each game played, and the player has no

way of knowing his score in advance.

We therefore respectfully submit that under the law such statute is unconstitutional as being arbitrary and repugnant to the equal protection of law clause of the 14th Amendment to the United States Constitution. *Lake Shore & M. S. R. Co. v. Smith,* 173 U. S. 684, *Connolly v. Union Sewer Pipe Co., supra, Cotting v. Kansas City Stock Yards Co.,* 183 U. S. 79.

CONCLUSION

The instant appeal presents a serious question as to whether the inclusion of the pin table machines involved within the prohibition of the statute assailed accomplishes or tends to accomplish the manifest purpose of the statute. The substantial question, therefore, arises as to whether such statute contravanes the due process of law clause of the 14th Amendment to the United States Constitution. It also has been pointed out that such statute prohibits the operation of one type of game and permits the operation of similar types without any reason for the distinction, and therefore the substantial question as to whether this statute contravenes the equal protection of law clause to the 14th Amendment of the United States Constitution is presented for the determination of this Court.

For the reasons herein and in accordance with the law applicable to the facts in the instant case we respectfully submit that the constitutional questions

raised by this appeal are substantial and the appellees' motion to dismiss or affirm should be overruled and denied.

APPENDIX XII

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

HOLLIDAY

v.

GOVERNOR OF STATE OF SOUTH CAROLINA et al.

Civ. A. No. 874.

July 20, 1948.

Henry H. Edens and Henry Hammer, both of Columbia, S.C., and Chandler, Bell & Chandler, of Greenville, S.C., for plaintiff.

John M. Daniel, Atty. Gen., and T.C. Callison and J. Monroe Fulmer, Asst. Attys. Gen., for Governor of State of South Carolina, and Attorney General of State of South Carolina.

J.D. Toddy, Jr., of Greenville, S.C., County Atty., for R.H. Bearden, Sheriff of Greenville County, S.C.

Before PARKER, Circuit Judge, and WYCHE and HUTCHESON, District judges.

WYCHE, District Judge.

The plaintiff in this suit seeks to enjoin the enforcement of Sections 1301, 1301-1, 1301-1(2), Code of Laws of South Carolina, 1942,[1] and Act No. 284 of

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[1] 'Sec. 1301. Slot machines unlawful. Except those giving certain returns.- It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State, any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return value for each coin deposited therein, and in which there is no element of chance. Any person who shall violate this section shall be subject to a fine of not more than one hundred dollars, or imprisonment upon the public works of the county wherein the offense is committed for a period of not more than thirty days.

'Sec. 1301-1. Unlawful to keep or operate vending or slot machines, punch board, etc., pertaining to game or chance.
'(1) Certain machines excepted.- It shall be unlawful for any person, firm, or corporation to keep on his, her, or its premises, or operate or permit to be kept on his, her, or its premises, or operated within this State, any vending or slot machine, punch boards pull boards, or other devices pertaining to games of chance of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance. Any person, firm, or corporation violating this section shall be subject to a fine of not more than five hundred ($500.00) dollars, or imprisonment upon the public works of the county wherein the offense is committed or in the State penitentiary for a period of not more than one (1) year or both fine and imprisonment, in the discretion of the court: provided, that this section is also intended to prohibit all vending, slot machines,

the Acts of 1947 of the General Assembly of South Carolina,[2] 45 St. at Large, p. 592, upon the ground that such Acts are in violation of Section 1, Article 14 (Fourteenth Amendment) of the United States Constitution.

These Acts, as construed by the South Carolina Supreme Court, declare 'coin operated non-payout Pin

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punch boards, pull boards, or other devices pertaining to games of chance, that display different pictures, words, or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine.
'(2) Seize said machines- magistrates to order destruction.- Any vending or slot machine, punch board, pull boards, or other device pertaining to games of chance, prohibited by this section shall be seized by any officer of the law and at once taken before any magistrate of the county in which such machine is seized, who shall immediately examine same, and if he is satisfied that such vending or slot machine is in violation of this section or any other law of this State, he shall direct that said machine be immediately destroyed.'

[2] 'Section 1. (a) That every person, firm or corporation owning, operating or maintaining any place of business, or other place, wherein or in connection with which, is operated or located any machine for the playing of music, games or amusements, operated by a slot wherein is deposited any coin or thing of value or any machine in which is kept any article to be purchased by depositing any coin or thing of value, or any coin operated non-payout Pin Tables with free play feature shall apply for and procure from the South Carolina Tax Commission a license for the privilege of operating any and every such machine and shall pay for such license a tax of Fifteen ($15.00) dollars per machine; * * * .'

Tables with free play feature' to be gambling machines per se, and as such subject to seizure and destruction.[3]

An interlocutory injunction was sought and a Court of Three Judges were constituted, pursuant to Section 266 of the Judicial Code, 28 U.S.C.A. § 330.

By consent, a hearing was held at Asheville, North Carolina, on June 23, 1948, at which time it was agreed by counsel for all parties that the case be submitted for a final decree upon the merits.

The basis for the jurisdiction of this Court is the allegations of plaintiff that he is the owner and conditional vendor of legal coin operated amusement machines (known as 'coin operated non-payout Pin Tables with free play feature'), without any gambling feature, located at various places in the State of South Carolina; that the machines are of a value in excess of $3000, and that the interest of the plaintiff as owner and conditional vendor of the machines is in excess of the sum of $3000; that he has been informed that the defendants intend to seize and destroy all of the machines in which the plaintiff has an interest, either as owner or as conditional vendor, which are located at various places within the jurisdiction of this court; that the machines are not legally subject to seizure and destruction by the defendants; that the amusement machines are not games of chance within the

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[3] Ingram et al. v. Bearden, 47 S.E.2d 833, 834.

provisions of the foregoing statutes of the State of South Carolina; that the statutes are unconstitutional, null and void, and in violation of the Fourteenth Amendment of the United States Constitution, because the statutes treat, embrace, regard and include the said coin operated amusement machines of the plaintiff as gambling devices per se, and subject them to seizure and destruction as gambling devices per se, although they are inherently innocent, and are not gambling devices per se; that their intended seizures and destruction, or any seizure and destruction of them, are and would be, in violation of plaintiff's constitutional rights; that unless defendants are enjoined, as prayed for, plaintiff will suffer immediate and irreparable injury, and that plaintiff is without an adequate remedy at law.

A temporary restraining order enjoining and restraining the defendants, their agents, or servants, from interfering with, seizure or destroying or threatening to seize or destroy any of the said machines owned by the plaintiff, or in which the plaintiff had an interest, was granted for ten days, without notice, under the provisions of 28 U.S.C.A. § 381, and also, Rule 65, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. Subsequently, the temporary restraining order was continued, by consent of the parties, until such time as the issues may be determined on the merits, or until the further order of the Court.

At the hearing plaintiff offered testimony to describe

the machines and had one of them operated in open court as part of the evidence in the case. The coin operated nonpayment Pin Tables with free play feature is about five feet long, three and one-half feet high, and is supported by four table legs. The playing field, containing lights and electrical contacts, is enclosed in a cabinet covered with glass, and is about forty-two inches long, and twenty-one inches wide. At the rear of the table is the back-board about twenty-one inches high; it stands with the legs about five and one-half feet high. The illuminated portion of the back-board is two feet by two feet. To put the machine in operation by a player a coin is placed in a slot which releases a certain number of steel balls to the player. To play, the ball is projected onto the playing field by a plunger. 'With different combinations, you hit certain numbers. With different (other) combinations, you don't hit certain numbers. Because in hitting certain numbers, you might detract from your score or fix it in such a way that you won't be able to build up a score as high as possible. * * * On this machine, you have numbers 1 through 6 inclusive. By hitting 1, 2, 3, and 4, you hit a light which is a double feature, which doubles the score placed on the bonus. The bonus is graduated by yellow and purple lights, distributed on the playing field. Every time you hit one of these playing lights (Illustrating), you advance your bonus one time. In order to take that bonus off, the ball has to drop through this playing field here. (Indicating) When you hit 1, 2, 3, 4, you light up a double-feature bonus, one hundred thousand, which enables you to collect two hundred thousands on your

bonus. When you hit your 5 and 6, you enable yourself to collect triple your ordinary bonus on the single' Some players make consistently higher scores than others. 'If a person walks in a place now and then and puts a nickel in the machine, he has no idea as to how the machine reacts when the ball hits a bumper. He can study the combinations, know where the ball is going to hit, know where he wants to put the ball and know how to put it there. Some person might put a nickel in and the ball rolls in and you don't get anything. You have to know how to operate the machine in order to get a score. * * * The skill comes in when you want to his a certain light, you have to know how hard to pull your plunger and how far to let your ball go to hit that light. If you don't know, naturally, you will not hit that light. ' After the ball has been released by the plunger and when the ball starts down the playing field the player can guide it. 'There is such a thing as shaking a pin ball machine. If you stand and let the machine idle it will strike a bumper with less force and rebound with less force than if the push the machine. * * * It can be used as a gambling device. * * * When you play your ball on your playing field, you strike certain lights. If you will watch these columns, they advance. (Indicating and illustrating) When you go through this slot, you get a single bonus. You light 1, 2, 3, 4, for a double bonus; light 5 and 6, you will have a triple bonus, which will give you three hundred thousand. ' 'Flippers' enable a player to utilize visual timing or physical timing to influence the course of the ball. 'If you know how to operate the machine, you can catch the ball (with

'flippers'), throw it up in the playing field and use it again. You have buttons on the sides. * * * If you strike one bumper and want to hit a certain number, if you don't shake the machine, it will glance, but if you shake the machine, it will go up and give you the object which you want to obtain.' In demonstrating the machine the witness won eleven free games, which gave him fifty-five free balls to play without putting up any more money. The score of a player is recorded on the back-board. The player has no way of knowing in advance what his score will be, the score being unpredictable, and being determined solely by the particular metallic post or pin with which the ball comes in contact. Plaintiff also offered in evidence slot machines, pull boards, punch boards, and other gambling devices, for the purpose of comparison with the machines sold by the plaintiff.

It is plaintiff's contention that his machines are not gambling devices, per se, and that for this reason the General Assembly of South Carolina has no right to declare them to be such.

The Supreme Court of South Carolina in Alexander v. Martin, Sheriff, 192 S.C. 176, 6 S.E.2d 20; in Alexander v. Hunnicutt, Sheriff, et al., 196 S.C. 364, 13 S.E.2d 630; and in State v. Appley, 207 S.C. 284, 35 S.E.2d 835, 162 A.L.R. 1184, decided that coin operated non-payout pin tables with free play feature were gambling machines per se under the statute, and were subject to seizure and destruction as such. In Ingram et al. v. Bearden 47 S.E.2d 833, the State Supreme Court again

held that coin operated non-payout pin tables with free play feature were gambling devices per se, subject to seizure and destruction, and that the licensing Act of 1947 did not render such machines, or their operation, legal.

In Alexander v. Martin, Sheriff, 192 S.C. 176, 6 S.E.2d 20, 23, the South Carolina Supreme Court gave its reasons for declaring coin operated non-payout pin tables with free play feature gambling devices per se in the following words:

'While it is true that the player receives the same number of balls for each coin deposited, he may or may not make the same score for each coin's worth of balls played. This in itself is an element of contingency, dependent upon chance, and would make of the machine as unlawful device, inasmuch as the law above quoted condemns all vending or slot machines or other devices pertaining to games of chance, which display different pictures, words or symbols at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine.

'In addition to this, contingent upon the score recorded for a player, free games are awarded. Therefore, it is clear that the lure and inducement to the player to operate the machine is the chance of occasionally being allowed to play a game or games without additional cost. This feature, we think, clearly pertains to a

game of chance. And this is true, whether the machine is played for amusement or for other returns, such as money.

'Amusement is recognized by the Courts as a thing of value, and where the amount of amusement given by the player of the machine is determined by chance or hazard, such machine is held to be a gambling device.'

The decisions of the courts of several other states are in full accord with the South Carolina decisions. Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke, 110 Colo. 82, 130 P.2d 920, 922;People v. Bitter, Sp. Sess., 32 N.Y.S.2d 176, 179;People v. One Pinball Machine, 316 Ill.App. 161, 44 N.E.2d 950, 953;Oatman v. Davidson, 310 Mich. 57, 16 N.W.2d 665, 666. The decisions seem to be unanimous in holding that the prohibition of pin table machines with free play feature is a valid exercise of the policy power and constitutes no violation of the Fourteenth Amendment. Woodward v. City of Lithonia, 191 Ga. 234, 11 S.E.2d 476;Eccles v. Stone, 134 Fla. 113, 183 So. 628;Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49;Sowma v. Parker, 112 Vt. 241, 22 A.2d 513;Phillips v. City of Atlanta, 57 F.Supp. 588, affirmed, 5 Cir., 145 F.2d 470.

The Supreme Court of Georgia (Woodward v. City of Lithonia, 191 Ga. 234, 11 S.E.2d 476) held that an ordinance of the town of Lithonia, Georgia, prohibiting pin table machines was a valid exercise of police power and did not violate the Fourteenth Amendment.

The Supreme Court of Florida in Eccles v. Stone, 134 Fla. 113, 183 So. 628, 631, in holding that non-payout pine table machines were gambling machines per se, and that the statute declaring them so, did not violate the Fourteenth Amendment, but that such a statute was a valid exercise of the policy power, said: 'It is also a matter of common knowledge that pursuant to the passage of that Act (the 1937 Florida Act (F.S.A. Sec. 849.15 et seq.) which prohibited the operation of the 'one-armed bandit' type slot machine) the popular slot machine with its set of pictured wheels, its alluring jackpot and its pull lever, generally known as the one-armed bandit, faded away from the public places and immediately in the places where they had stood were set up the mechanical horse races, marble pine games and other coin-operated mechanical devices, adapted and fit for fast, easy gambling; and it is a matter of common knowledge, of which we cannot plead ignorance, that these machines are generally used a gambling devices and that the gambling element is the principal lure which causes them to be played by the public.'

North Carolina has a similar statute and the Supreme Court of that State in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49, 54, decided that a statute prohibiting the manufacture, sale and possession of gambling apparatus, and defining prohibited devices so as to include pin table machines, was a reasonable regulation within the police power of the State of North Carolina, and did not violate the Fourteenth Amendment. In this case it was said: 'In the instant

case, when considered in the light of a state policy of suppressing and prohibiting gambling, there is a reasonable relation between a coin-operated slot machine in the playing of which the operator may make varying scores or tallies upon the outcome of which wagers may be made, and those so operated which may give a return of something of value which is unknown to, or unpredictable by, the operator. The element of chance is present. This justifies sustaining the statute as a reasonable regulation, and within the police power vested in the Legislature.'

The Supreme Court of Vermont in the case of Sowma v. Parker, 112 Vt. 241, 22 A.2d 513, 516, in deciding that an Act prohibiting pin ball machines was constitutional, said: 'That No. 190 of the Acts of 1941 was also a police measure cannot be doubted as it is apparent that it was passed in order to promote the morals and general welfare of the citizens of the State for it had become a matter of common knowledge that the results of the playing of such machines were iniquitous and detrimental, both financially and otherwise, to the players and often to those dependent upon them.'

In the case of Phillips v. City of Atlanta, 57 F.Supp. 588, the United States District Court for the Northern District of Georgia, declared that an ordinance of the City of Atlanta prohibiting pin ball machines was a valid exercise of the police power against an attack on the ordinance on the grounds that it violated the Fourteenth Amendment. The Circuit Court of Appeals

for the Fifth Circuit affirmed the District Court. Phillips v. City of Atlanta, 5 Cir., 145 F.2d 470.

It is well established that statutes having for their object the suppression of gambling are within the scope of the police power vested in the States. 12 C.J. 918, 16 C.J.S., Constitutional Law, § 186.

In the case of Murphy v. California, 225 U.S. 623, 32 S.Ct. 697, 698, 56 L.Ed. 1229, 41 L.R.A., N.S., 153, the Supreme Court declared that: 'The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted. * * * 'A calling may not in itself by immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious."

Plaintiff relies strongly upon the case of Washington Coin Mach. Ass'n v. Callahan, 79 U.S.App.D.C. 41, 142 F.2d 97, 98. In this case the United States Court of Appeals of the District of Columbia was construing the

penal statutes of the District of Columbia, which make it unlawful to set up, or keep in the District any kind of gambling device designed for the purpose of playing any game of chance for money or property. In that case it was said: 'Enough has been said to indicate that the issue below and here is limited to the question whether the award of a free play or a second try, in the circumstances we have described, makes such a device a gaming table and its use a game of chance 'for money for property.' * * * Unquestionably, the purpose of Congress in the enactment of the local law was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward.'

It will be seen that the question in that case was: Was the pin table machine a gaming table and its use a game of chance for 'money or property.' The South Carolina Statute is much broader. While the opinion of Chief Justice Groner, by way of obiter dictum, and the authorities cited, tend to support plaintiff's contention that a pinball machine is not a gambling device per se, the question there decided was whether or not the machine was used as a game of chance for 'money or property.' That question is not involved here. We must place upon the South Carolina Statute the meaning given it by the Supreme Court of that State; and the only question that remains is whether, as so construed, the Statute violates the Federal Constitution. In the District of Columbia case, the only question was whether the Statute covered the pinball machines in question in that case.

It is the public policy of the State of South Carolina to suppress gambling. Gambling in all forms is illegal in South Carolina. A negotiable instrument executed in payment of a gambling debt is 'utterly void, frustrate, and of none effect' under the statute law of South Carolina (Section 6311, Code of Laws of South Carolina, 1942), and the Legislature of South Carolina, in its discretion, in carrying out this public policy, determined in 1931 that any coin operated machine which does not give a uniform and fair return in value for each coin deposited, and in which there is any element of chance, was illegal as being a gambling device, and as tending to promote and encourage the gambling instinct.

Under the facts in this case and under the authorities herein cited, we must conclude that a coin operated non-payout pin table with free play feature is a gambling machine. The owners of these machines require a price to be paid for operating them. While there may be some skill in operating the machines, as demonstrated to the Court at the hearing, the score the player receives varies with each game and is the result of chance. Depending upon that score the player either receives or does not receive a prize in the form of additional free games and additional amusement. These machines have all the elements of a gambling machine, namely, consideration, chance and prize. They do not give a certain uniform return value for each coin deposited. The varying scores are conducive to side wagers. The owner could easily agree to pay off

the winner with money instead of playing balls.

The business of the plaintiff in selling and operating pin table machines is not recognized as a necessary or useful business. It is potential of evil. Playing his machines may be fraught with danger to the morals of those who play. These machines are usually located in resorts, public places, hotels, and drug stores, where all who can pay the price are at liberty to come and play. They may have a tendency to collect idle people, school boys and college students together, to detain business people from their business, and wage earners from their work. The owners and operators of such machines are interested in stimulating play and in having as full attendance each day as possible, from which temptations, beyond mere amusement are likely to result. The General Assembly of South Carolina, under its police power, had the right to declare such machines gambling machines per se, and as such illegal in the State of South Carolina. It had the right by such legislation to guard the youth of the State, school boys and college students against the insidious temptations and protect them from the evil and corrupting influences that may be clustered around and emanate from the coin operated pin ball machines, an instrumentality that adds nothing to the general welfare, affords no employment to the unemployed, produces nothing, where nothing is bought and carried home and used, and is merely a civic parasite.

For the reasons herein stated we must conclude that the statute in this case is clearly a valid exercise of the

police power of the State of South Carolina, and constitutes no attempt on the part of the State to deprive plaintiff of his property without due process of law.

The findings and conclusions in this Opinion will stand as the Findings of Fact and Conclusions of Law in this cause under 52(a) of the Rules of Civil Procedure. An Order so providing will be included in the final decree for the defendants which will deny the injunction sought in this suit.

Accordingly, an Order denying the injunction and dismissing the action will be filed herewith.

(3)

No. 07-1074

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In The

Supreme Court of the United States

ROBERT STEWART, AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, HENRY MCMASTER, AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA AND RALPH HOISINGTON, AS SOLICITOR OF THE NINTH JUDICIAL CIRCUIT,

Petitioners,

vs.

JIMMY MARTIN AND LUCKY STRIKE, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit properly held that *Burford* abstention does not apply to federal constitutional challenges to two South Carolina statutes outlawing devices pertaining to "games of chance" because resolution of these challenges neither requires the court to adjudicate difficult questions of state law, nor disrupts state efforts to establish through a complex regulatory process a coherent policy on a matter of substantial public concern.

DISCLOSURE STATEMENT

Lucky Strike LLC is not a public corporation, but rather is a privately held limited liability corporation under South Carolina law.

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INTRODUCTION

The Petition presents no compelling reason supporting an exercise of this Court's jurisdiction. The Fourth Circuit interpreted and applied *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) abstention principles in accordance with this Court's precedent. Furthermore, Petitioner has not identified any real split of authority within the Circuits. Rather, Petitioner attempts to manufacture such a split by mischaracterizing the Fourth Circuit's ruling.

In an effort to justify this Writ, Petitioner argues that the Fourth Circuit creates an "exception" to *Burford* abstention to facial challenges to legislative enactments. The Fourth Circuit's carefully reasoned opinion creates no new exception to *Burford* abstention. Rather, the Fourth Circuit recognizes that *Burford* abstention is the exception to the federal court's obligation to rule upon cases within its jurisdiction. The Fourth Circuit correctly applied this Court's decisions in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Zablocki v. Redhail*, 434 U.S. 374 (1978) by concluding that abstention did not apply to Respondents' facial challenges which do not involve interpretation of difficult questions of state law.

COUNTERSTATEMENT OF THE CASE

Respondents commenced an action seeking declaratory and injunctive relief under the authority of *Ex Parte Young*, 209 U.S. 123 (1908) against various South Carolina State Officials charged with enforcing the State's laws outlawing "games of chance" alleging that the challenged statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that Respondents are being subjected to unconstitutional discriminatory enforcement practices. The District Court believed that the *Burford* doctrine required abstention and dismissed the Complaint.

Respondents appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit reversed and held that Respondents' facial constitutional challenges to the statutes at issue do not turn upon "difficult questions of state law." The Fourth Circuit further concluded that Respondents' claims do not threaten a state interest in uniform regulation that outweighs the federal interest in adjudicating the case. As a result, the Fourth Circuit ruled that *Burford* abstention was not applicable. The Dissent, and Petitioners herein, argue for the creation of a blanket gambling law abstention doctrine which does not exist.

Petitioner's Petition for Rehearing En Banc challenging the correctness of the panel's ruling on the grounds raised to this Court was denied.

REASONS FOR DENYING THE PETITION

I. RESPONDENTS' CLAIMS ARE BASED SOLELY UPON FEDERAL CONSTITUTIONAL CHALLENGES TO SOUTH CAROLINA'S STATUTES AND DO NOT INVOLVE INTERPRETATIONS OF STATE LAW NOR IS THERE ANY STATE ADMINISTRATIVE OR REGULATORY BODY TO WHICH FEDERAL COURTS SHOULD DEFER

Respondents' claims rest primarily on the authority of *Ex Parte Young*, 209 U.S. 123 (1908), which is cited most often for the proposition that the Eleventh Amendment does not bar suits for declaratory and injunctive relief against State officers in their official capacity whose duties are to enforce State law which contravenes the United States Constitution or other federal law. *Ex Parte Young* also ruled that the State cannot impose a condition upon a party interested in obtaining a judicial decision involving a complicated or technical question of fact that, if unsuccessful, the party is subject to criminal punishment.

Ex Parte Young involved a challenge to the State of Minnesota's legislation setting a maximum passenger rate to be charged by railroads in Minnesota. The Act also provided criminal punishment and fines against any railroad company, officer, or agent who charged a rate in excess of the maximum allowed. Furthermore, under the Act being challenged, there was no mechanism in which a railroad company could challenge the sufficiency of the rate. The U.S. Supreme Court determined that the Act denied the

railroad companies' equal protection of the laws and its property was subject to being taken without due process of law because the company was only allowed a hearing on the claim of the unconstitutionality of the Act at risk of being subjected to criminal penalties. The Court explained:

> "To impose upon a party interested in the burden of obtaining a judicial decision of such a question . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these Acts, is, in effect, to close up all approaches to the Courts, and thus prevent any hearing upon the questions of whether the rates as provided by the Acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the Act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation."

Id. at 148.

The Complaint alleges that the determination of whether a particular amusement device contains the necessary elements of skill over chance involves a specialized factual determination that can only be made after expert investigation and analysis. Moreover, Respondents allege in the Complaint that Petitioners are discriminatorily enforcing S.C. Code § 12-21-2710 by allowing devices that have been specifically ruled illegal in prior judicial rulings to

operate in video arcades catering to young children where young children can redeem coupons for merchandise while seizing equipment of Respondents that have never been subject to any judicial ruling. Respondents allege that this discriminatory enforcement is designed to restrict Respondents' participation in the political process in South Carolina in violation of Respondents' constitutional rights.

The District Court relied almost exclusively upon the Fourth Circuit decision in *Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999) in reaching its decision to abstain under *Burford*. There, the Fourth Circuit vacated an injunction entered by the District Court that sought to enforce the State's regulatory scheme over video gambling. The Fourth Circuit also remanded the case with directions to dismiss or remand to state court all claims of equitable relief and to stay proceedings on claims of damages pending the resolution by the state courts of disputed questions of state law.

In *Johnson v. Collins*, plaintiff's federal RICO claims were premised upon violations of state law. Moreover, the state law questions were unresolved and very significant to the overall regulation of video gaming in South Carolina at the time. For this reason, the Court of Appeals held that the District Court erred by answering disputed questions of state gaming law. The court stated that, "The District Court contravened *Burford* principles by attempting to answer disputed questions of state gaming law that so powerfully impacts the welfare of South Carolina

citizens." The Court further explained that "Issues of state law and state public policy have dominated this action from day one. Most notably, the parties have contested the meaning of the $125 payout limit . . . when the District Court interpreted this provision, it was necessarily trying to predict how the South Carolina Supreme Court would decide the question. . . . But because this question involved a most basic problem of South Carolina public policy, the state court system should have been permitted the first opportunity to resolve it." *Id.* at 720.

Respondents' claims in the case at bar do not involve disputed issues or interpretation of State law. Rather, Plaintiffs' claims are based solely upon a constitutional challenge to the State of South Carolina's settled application of S.C. Code §§ 12-21-2710 and 12-21-2712.

Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003) rather than *Johnson v. Collins* is instructive. In *Helton v. Hunt*, the Fourth Circuit Court of Appeals held that portions of the North Carolina gaming statutes which authorized law enforcement officers to seize and destroy video game machines without any judicial oversight violated due process. In the District Court, defendants moved to dismiss the case pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The District Court denied the Motion to Dismiss stating:

> "The Declaratory Judgment Act has been consistently utilized to determine the constitutionality of criminal statutes . . . In order

> to establish standing – and thus subject matter jurisdiction – under the Declaratory Judgment Act, the plaintiff must show (1) a case of actual controversy, and (2) an independent source of federal jurisdiction. . . . Here, the amended complaint alleges that the application of the statutes at issue would violate the United States Constitution which satisfies the second prong of this test. While in the case of an ongoing, state-court prosecution, federal courts will abstain from granting declaratory relief, nothing will prevent such action in the absence of an extant state court proceeding. *Younger v. Harris*, 401 U.S. 37 (1971)."

Helton v. Good, 330 F.Supp.2d 597 (W.D.N.C. 2002).

II. *BURFORD* ABSTENTIA IS THE EXCEPTION, NOT THE RULE, AND SHOULD ONLY BE APPLIED WHEN THE FEDERAL COURT'S RULING WILL INTERFERE WITH PROCEEDINGS OF STATE ADMINISTRATIVE AGENCIES OR WHERE UNCONSTRUCTED STATUTES CAN BE INTERPRETED TO AVOID THE CONSTITUTIONAL CHALLENGE AND NEITHER SITUATION IS INVOLVED IN THIS ACTION

Federal courts have a strict duty to exercise the jurisdiction that is conferred upon it by Congress. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), *citing Colorado River Water Conservation Dist. v. United States*, 424

U.S. 800, 821, 96 S.Ct. 1236, 1248, 47 L.Ed.2d 483 (1976). As stated in *New Orleans Public Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358-59, 109 S.Ct. 2506, 2513, 105 L.Ed.2d 298 (1989):

> "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). "'[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'" *Chicot County v. Sherwood,* 148 U.S. 529, 534, 13 S.Ct. 695, 697, 37 L.Ed. 546 (1893) (citations omitted). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas. Co.,* 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909) (citations omitted). *Id.* Thus, "'[a]bstention from the exercise of federal jurisdiction is the exception, not *773 the rule.'" *Wilson v. Valley Electric Membership Corp.,* 8 F.3d 311 (5th Cir. 1993) *citing Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244.

The *Burford* doctrine is one of a limited number of abstention doctrines that have been enunciated by

the Supreme Court. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) Sun Oil Co. challenged a drilling permit issued to Burford by the Texas Railroad Commission. Sun Oil contended that the order violated state law and the federal Due Process Clause. The Supreme Court held that the district court should have abstained based on "the comprehensive nature of the state regulatory scheme, the large interest of the state in regulating and conserving its oil and gas resources, and the need for a unified approach to granting permits by a single adjudicatory body." *Sierra Club v. City of San Antonio,* 112 F.3d 789, 793 (5th Cir. 1997) *citing Burford,* at 327-34, 63 S.Ct. at 1104-08.

In *New Orleans Public Service Inc. v. City of New Orleans,* the Supreme Court distilled the principle of the *Burford* doctrine, by stating: "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceeding or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Service, Inc.,* at 362, 109 S.Ct. at 2515.

The present case does not involve a state law claim, nor is there an assertion that the federal

claims are "in any way entangled in a skein of state-law that must be untangled before the federal case can proceed." *Id.*; *See also*, *Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999) (Issues of State law and State public policy have dominated this action from day one. Most notably, the parties have contested the meaning of the $125 payout limit . . . when the District Court interpreted this provision, it was necessarily trying to predict how the South Carolina Supreme Court would decide the question). Rather, Respondents' claims are based solely upon a constitutional challenge to the State of South Carolina's settled application of S.C. Code §§ 12-21-2710 and 12-21-2712. Specifically, Respondents allege that they are being denied their rights to Due Process and Equal Protection because the statutory scheme prevents Respondents from obtaining a determination regarding the legality of a particular amusement device except upon the condition that if unsuccessful he must suffer imprisonment, forfeit property and/or pay a fine. Petitioners have not and cannot contest that there is no administrative or regulatory process by which a video game machine or other amusement device can be approved and that the Respondents only avenue for such a determination is through a civil forfeiture proceeding where Respondents risk loss of property and are subjected to criminal sanctions. As a result, the State of South Carolina, similar to the Minnesota's railway rate legislation challenged in *Ex Parte Young*, 209 U.S. 123 (1908), has closed up all approaches to the Courts.

In addition, exercise of jurisdiction in this case will not interfere with any proceedings or orders of state administrative agencies and will not disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. First, there are no administrative orders or regulations currently governing the operation of video game machines, other than a requirement that a machine owner pay a license fee. *See* S.C. Code § 12-21-2720. Following the Fourth Circuit's decision in *Johnson v. Collins*, on July 1, 2000 the State of South Carolina repealed all laws authorizing and regulating cash payouts on video poker machines. *See*, *Joytime Distributors v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999). Moreover, the State laws that define whether a particular video game is lawful do not provide an adequate state court review. The only review available is from a magistrate's order destroying an alleged illegal video game or a criminal conviction for possessing an alleged illegal video game. As established by *Ex Parte Young*, this is not an adequate review.

The Fourth Circuit decisions upholding or requiring abstention under *Burford* uniformly defer to an administrative or regulatory process, which is totally lacking in the present case. For example, in *First Penn-Pacific Life Insurance v. Evans*, 304 F.3d 345 (4th Cir. 2002) the Court concluded that the lower court correctly abstained from exercising jurisdiction in order to avoid interfering with State receivership proceedings. In *Brandenburg v. Seidel*, 859 F.2d 1179

(4th Cir. 1998), the Court also upheld *Burford* abstention where there were ongoing state receivership proceedings. In *Johnson v. Collins*, as stated previously, the Court relied upon the existence of a detailed regulatory process administered by the South Carolina Department of Revenue that was tasked with enforcing a $125.00 payout limit, the number of videogame machines at a single place or premise advertising restrictions and other detailed regulations. Moreover, in *Fisher v. King*, 232 F.3d 391 (4th Cir. 2000), the Court ruled that *Burford* abstentia is not appropriate unless the claim involves an unconstructed State statute that is susceptible of a construction by the State judiciary which might avoid, in whole or in part, the necessity for federal constitutional adjudication, citing *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976).

Here, there is no such administrative or regulatory process to which this Court should defer. Further, there are no un-constructed State statutes at issue. Rather the entire challenge is to settled procedure denying Respondents any opportunity to have either a judicial or quasi-judicial ruling upon the legality of any proposed video game machine except upon risking the loss of property and personal liberty.

CONCLUSION

The Fourth Circuit correctly distinguished Respondents claims from those seeking a federal ruling that a particular video gambling device is legal under a State's law regulating such devices. The Fourth Circuit's opinion further exposes Petitioner's mischaracterization of Respondents claims, mischaracterizations which Petitioners continue to assert before this Court. Judge Motz well-reasoned opinion correctly applies *Burford* abstention doctrine and concludes that Respondents claims fall well outside the narrow category of cases to which *Burford* abstention may apply.

Respectfully submitted,

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In The Supreme Court of the United States

Robert Stewart, as Chief of the South Carolina Law Enforcement Division, Henry McMaster, as Attorney General of the State of South Carolina and Ralph Hoisington, as Solicitor of the Ninth Judicial Circuit,
Petitioners,

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Jimmy Martin and Lucky Strike, LLC,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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May 30, 2008

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REPLY BRIEF FOR PETITIONERS

The brief in opposition filed by Respondents Martin and Lucky Strike, LLC., while long on language restating its position that the Fourth Circuit correctly decided this case, provides no effective response to Petitioners' compelling showing that certiorari is warranted.

I. Immediate Review Is Necessary Because The Majority Failed To Apply The Correct Legal Standard For Burford Abstention, Leaving The State's Longstanding Gambling Forfeiture Statutes Under A Cloud Of Uncertainty In Federal Court.

Contrary to Respondents' contentions, and the majority's reasoning, this case is the consummate one for abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In reversing the District Court's abstention under *Burford*, the majority clearly ignored precedents of this Court. Although Respondents make a constitutional attack in federal court upon South Carolina's longstanding gambling forfeiture statutes, their federal claims are minimal and South Carolina's police power prerogatives are at a premium. In such instances, abstention is clearly applicable. *Burford, id.*

This case is, therefore, unlike decisions where abstention was inapplicable, such as *McNeese v. Bd. of Ed.*, 373 U.S. 668 (1963), a case involving freedom from racial discrimination – a "fundamental injury"– *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987). Here, Respondents' federal challenges are raised in the

context of the South Carolina legislature's having declared in 1931 all gambling devices to be contraband *per se*. This Court recognizes the strong state interest in asserting "in rem jurisdiction over .... [such contraband] in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions...." And, in these circumstances, Due Process does not require a preseizure hearing. *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 679 (1974).

Indeed, over one hundred years ago, the Court held that seizure and destruction of a legislatively declared "public nuisance," such as gambling instrumentalities, may be accomplished constitutionally by "summary" proceedings. *Lawton v. Steele*, 152 U.S. 133 (1894). *See also, North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) [summary seizure of unfit food without prior hearing is valid]. As Justice Harlan concluded in *Booth v. Illinois*, 184 U.S. 425, 427 (1902), a statute regulating gambling is given considerable leeway unless constituting "a clear, unmistakable infringement of rights secured by the fundamental law."

More recently, the Court recognized that "gambling .... implicates no constitutionally protected right." *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993). *See also, AhSin v. Wittman*, 198 U.S. 500, 505 (1905) [anti-gambling legislation enforceable unless clearly violating fundamental law]; *Stone v.*

Mississippi, 101 U.S. 814, 821 (1879) [lotteries "disturb the checks and balances of a well-ordered community."] Furthermore, in *United States v. Korpan*, 354 U.S. 271 (1957), this Court completely rejected any claim that the phrase "involved an element of chance" – as used in the federal criminal statute requiring the payment of an occupational tax upon "so-called 'slot machines'" – was unconstitutionally vague. Respondents make similar vagueness contentions regarding the South Carolina forfeiture statutes which ban all devices "pertaining to games of chance." In short, the majority in disregarding these precedents, leaves South Carolina's gambling statutes under the cloud of federal court intervention.

II. The Majority Failed To Consider *Holliday v. State*, 335 U.S. 803 (1948), A Summary Decision Upholding South Carolina's Predecessor Gambling Forfeiture Statutes As Constitutionally Valid.

That Respondents' constitutional claims are negligible is demonstrated by the fact that similar claims regarding a similar version of the South Carolina statutes have been summarily rejected by this Court. In *Holliday v. State*, 335 U.S. 803 (1948), affirming 78 F.Supp. 918 (W.D.S.C. 1948), the plaintiff contended, as Respondents do, that South Carolina's gambling forfeiture statutes are

> unconstitutional, null and void, and in violation of the Fourteenth Amendment of the United States Constitution, because the statutes treat, embrace,

> regard and include the said coin operated amusement machines of the plaintiff as gambling devices *per se*, and subject them to seizure and destruction as gambling devices *per se* although they are inherently innocent ....

Pet. App. at a165. As in *Holliday*, Respondents allege that

> S.C. Code § 12-21-2710's prohibition against possessing any "device pertaining to games of chance of whatever name or kind" read literally outlaws most all amusement games, including board games like Monopoly©, a simple deck of cards or dice, and a host of electronic games found on most home computers and cell phones ....

Id. at a75. Yet, the three-judge court in *Holliday*, unpersuaded by plaintiff's "inherently innocent" arguments, rejected the claim that South Carolina's forfeiture statutes violate equal protection or due process, concluding that the predecessor to §§ 12-21-2710 and 12-21-2712 was a "valid exercise of the [State's] police power ...." 78 F.Supp. at 925. On appeal to this Court, South Carolina urged dismissal of the appeal or affirmance of the judgment below because "the [constitutional] questions on which the decision of the cause depends are so insubstantial as not to require further argument ... [in that] ... [t]he State of South Carolina has the right to declare the

machines in question to be gambling devices *per se*."[1] This Court obviously agreed; the judgment of the three-judge court, concluding that the statutes do not violate the Fourteenth Amendment, was summarily affirmed. 335 U.S. 803.

Here, Respondents, in their *Brief in Opposition*, ignore *Holliday* completely. By doing so, they tacitly acknowledge that *Holliday* renders their Due Process and Equal Protection attacks upon South Carolina's gambling forfeiture statutes to be, at best, tenuous, if not altogether insubstantial.

Thus, if the minimal federal interest in revisiting the constitutionality of South Carolina's anti-gaming scheme had been properly weighed against the overarching state interests in outlawing and condemning gambling devices, as this Court requires, see *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), this case should have easily warranted *Burford* abstention. As Justice Kennedy wrote in concurrence in *Quackenbush*, "principles of equity thus are not the sole foundation of abstention rules; obligations of comity and respect for the appropriate balance between federal and state interests, are an important part of the justification and authority for abstention as well." *Id.* at 733-734 (Kennedy, J. concurring). Accordingly, even if no "'difficult questions of state law'" are raised by this case, (we argue in our Petition, however, see, pp. 18-19, n. 5,

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[1] Copy of State's Motion to Dismiss or Affirm in *Holliday* recently obtained from United States Supreme Court Library.

that such state law questions abound), this is, nevertheless, a situation "'where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Publ. Serv. Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (*NOPSI*), quoting *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 814 (1976). In view of the obvious disruption of South Carolina's strong anti-gambling policy, *Burford* abstention should have applied.[2]

III. The Majority Also Failed To Consider Decisions Of This Court Where Abstention Was Appropriate Notwithstanding Constitutional Challenges To The State's Regulatory Scheme.

However, Respondents urge, and the majority adopted, a "facial challenge" exception to *Burford* abstention, one which would, in the words of dissenting Judge Wilkinson, "... render *Burford* abstention virtually inapplicable to all constitutional challenges in federal court to specialized regulatory schemes." *Pet. App., supra* at a28. (Wilkinson, J. dissenting). In

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[2] Respondents misread the alternative two-pronged requirement of *Burford*, as set forth in *NOPSI*. *Burford* is not, as Respondents claim, rendered inapplicable by their "facial challenges which do not involve interpretation of difficult questions of state law." *Brief In Opposition* at 1. The Court must also look to the disruption of South Carolina's clear anti-gambling policy.

essence, so long as a plaintiff's challenge to a regulatory scheme is characterized as a "facial" attack upon the scheme itself, the majority would conclude that such claims virtually eliminate *Burford* abstention and entitle plaintiff's case to proceed in federal court. The majority relied largely upon *Bath Mem. Hosp. v. Maine Health Care Finance Commission*, 853 F.2d 1007 (2nd Cir. 1988), decided before *NOPSI*, which concluded that *Burford* "rested upon the threat to the proper administration of a *constitutional* state regulatory system." 853 F.2d at 1013. (emphasis in original). The majority panel thus not only disregarded, but rewrote, *Burford's* second prong, articulated in *NOPSI*, finding that if Respondents are successful in their constitutional claims, they would be entitled to have enjoined "all enforcement of the statutes at issue ...." Accordingly, found the majority, "such relief could not possibly threaten their uniform application." *Pet. App., Id.* at a15.

Respondents attempt now to claim that the majority decision created no exception to *Burford* for "facial" challenges to the State's regulatory scheme. *See, e.g. Brief In Opposition, supra* at 1. Yet, Respondents at the same time contend that their claims "are based solely upon a constitutional challenge to the State of South Carolina's settled application of S.C. Code §§ 12-21-2710 and 12-21-2712 ...," thereby rendering *Burford* inapplicable. *Id.* at 6. Such an analysis clearly seeks a *Burford* exception for constitutional challenges to the regulatory scheme, as the majority here created. As noted above, no less authority on abstention than

Judge Wilkinson certainly thought the majority created such an exception to *Burford*, one which essentially swallowed the rule.

Therefore, as Judge Wilkinson explained, the majority's reasoning was clearly wrong and a marked departure from this Court's decisions. Over the years, the Court has frequently observed that the principles of abstention and comity are not rendered inapplicable when plaintiff seeks to challenge the constitutionality of the State's regulatory scheme. In *Fenner v. Boykin*, 271 U.S. 240, 243 (1926), for example, the Court distinguished *Ex Parte Young*, 209 U.S. 123 (1908), relied upon so heavily by Respondents. *Fenner* indeed noted that, consistent with *Young*, in certain extraordinary instances, "[c]ourts of the United States have power to enjoin state officers from instituting criminal actions." Ordinarily, however, "there should be no interference with such officers ..." and the "accused should first set up and rely upon his defense in the state courts, *even though this involves a challenge to the validity of some statute*, unless it plainly appears that this course would not provide adequate protection." (emphasis added). *See also*, *Watson v. Buck*, 313 U.S. 387, 400 (1941) ["(f)ederal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional."]; *Spielman Motor Sales v. Dodge*, 295 U.S. 89, 95 (1935) [same].

The Court's invocation of comity – even where there is a constitutional challenge to a state statute – is not confined to criminal enforcement, however. Subsequent decisions involving challenges to the constitutional validity of state tax systems are also particularly instructive. For example, in *Fair Assessment In Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100, 116 (1981), the Court, relying upon cases such as *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, as well as *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943) and *Matthews v. Rodgers*, 284 U.S. 521 (1932), concluded:

> [t]herefore, despite the ready access provided by *Monroe* [*v. Pape*, 365 U.S. 167 (1961)] and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete ... and may ultimately seek review of the state decisions in this Court.

Moreover, in *Moore v. Sims*, 442 U.S. 415 (1979), the Court rejected the view which the majority assumed to be operable here, that the doctrine of

abstention (in this instance *Younger* abstention)[3] could not be applied where the state procedures themselves were being constitutionally challenged. *Moore* stated that any "argument that a constitutional attack on state procedures automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases is reiteration of a theme sounded and rejected in prior cases." *Id.* at 426, n. 10. In the Court's view, "[t]he pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings." *Id.* at 425. Further, the *Moore* Court emphasized:

> [t]he breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not against it. This is evident in a number of distinct but related lines of abstention cases which, although articulated in different ways, reflect the same sensitivity to the primacy of the State in the interpretation of its own laws and the cost to our federal system of government inherent in federal-court interpretation and subsequent invalidation of parts of an integrated statutory framework.

And, in *Trainor v. Hernandez*, 431 U.S. 434, 439

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[3] The *Younger* line of cases is recognized as "a variant of *Burford*-type abstention." 17A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, § 4241. As this Court has stressed, abstention doctrines are not "rigid pigeonholes." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11, n. 9 (1987).

(1977), based upon *Younger* abstention, this Court reversed the conclusion of the District Court that the statutes in question "on (their) face [are] patently violative of the due process clause ...."

Similarly, *NOPSI* made clear that the applicability of abstention (there, *Younger* abstention) is not dependent upon the type of constitutional challenge mounted in the federal action. While *Burford* abstention was deemed inapplicable to the federal preemption claims involved in *NOPSI*, the Court proceeded to comment upon the argument that abstention is *automatically* inapplicable based upon the nature or type of claim made. In the Court's view,

> [t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than preemption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction.... That is so because when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case – which could arguably be offset by a substantial

> federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State....

Id. at 365-366.

Moreover, in his concurring opinion in *NOPSI*, Chief Justice Rehnquist made it clear that even with regard to the preemption claim present, *Burford* abstention would not necessarily be rendered inapplicable by such claim. The Chief Justice noted that he "... would not foreclose the possibility of *Burford* abstention in a case like this had the State consolidated review of the orders of local rulemaking bodies in a state court with power to hear a federal pre-emption claim." 491 U.S. at 361. His view is consistent with the correct rule to be applied here: *Burford's* applicability is not defeated solely by the presence of a "facial" attack upon South Carolina's gambling forfeiture statutes.

Strikingly, even aside from the aforementioned cases, the *Holliday* decision makes this case one which is quite similar to *Alabama Pub. Serv. Comm'n. v. Southern Ry. Co.*, 341 U.S. 341 (1951). Like the statutes in question in the case at hand (which were previously deemed constitutional in *Holliday*), the statute involved in *Alabama Pub. Serv. Comm.* had also theretofore been upheld by this Court. See, *St. Louis-San Francisco R. Co. v. Alabama Public Serv. Comm.*, 279 U.S. 560 (1929). Nevertheless, Plaintiff in *Alabama* attacked the statute by challenging the order issued pursuant thereto as unconstitutional. Indeed,

Appellants there contended that the case involved "a suit to restrain state officials from enforcing unconstitutional state laws" and was thereby prohibited by the Eleventh Amendment. *Id.* at 344, n. 4. This Court concluded, however, that based upon its previous ruling, the statute was constitutionally valid, against a Commerce Clause and Due Process challenge, see 279 U.S. 560. Thus, the subsequent case was not one "in which the constitutionality of a state statute is drawn into question," 341 U.S. at 344, and n. 5. Accordingly, *Burford* controlled. The parallels between *Alabama Pub. Serv. Comm.* and this case are thus striking. *See also, Martin v. Creasy*, 360 U.S. 219 (1959) [citing *Alabama Pub. Serv. Comm; supra* with approval].

IV. Contrary To Respondents' Assertions, There Is A Split of Authority Among Lower Federal Courts Regarding Application of *Burford*, Thus Warranting Review By This Court.

Accordingly, the majority misapplied this Court's precedents and even ignored them. Had those precedents been followed, the majority would have affirmed the District Court's decision to abstain under *Burford*. Contrary to Respondent's contentions, *see Brief In Opposition* at 11, the State's statutory forfeiture scheme gives them an adequate opportunity to raise any constitutional claims the may have. As shown in our *Petition*, pp. 6-7, this state procedure has addressed numerous federal constitutional claims regarding the process over the years. Moreover, with

respect to Respondents' claim that we have identified no "split in authority," *Brief In Opposition* at 1, both Judge Wilkinson, in his dissent, *Pet. App. a25* - a26 (lower courts "rife in conflicting approaches" to *Burford*) and Petitioners in our *Petition* (pp. 25-29) amply demonstrate the conflict regarding *Burford's* applicability.

The words of Judge Wilkinson are especially worthy of reflection by this Court in this case. In dissent, he wrote that "[t]he majority deprives the state of significant measures of control, over issues touching not simply the pros and cons of gambling, but the very tone and quality of life within state borders. *Pet. App.* at a50. Abstention was designed to protect such important state interests.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The Court may wish to summarily vacate the majority's decision below.

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